No. 82-1177

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYD'S AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN and DENNIS L. HUNTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

Whether opposing counsel's conduct during trial, which was characterized by the dissenting judge below as "outrageous misbehavior", which rendered the trial a "travesty", and which was sanctioned by the majority opinion below, was such a departure from the accepted and usual course of judicial proceedings so that petitioners were denied a fair jury trial against the individual respondents and prejudiced in their case against the respondent United States.[1]

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[1]The only parties to the proceeding in the Court of Appeals were those parties appearing on the caption of this case. The petitioners herein are insurance companies and are not subsidiaries or affiliates of any publicly-owned corporation not named in the appeal of this matter, with the exception of the following: The Aetna Casualty and Surety Company which is a subsidiary of Aetna Life and Casualty Company, Hartford, Connecticut; Aetna Insurance Company which is a subsidiary of Connecticut General Insurance Corporation, Hartford, Connecticut; American Empire Insurance Company which is a subsidiary of American Financial Corporation, Cincinnati, Ohio; Commercial Union Insurance Company which is a subsidiary of Commercial Union Corporation, which is a wholly-owned subsidiary of Commercial Union Assurance Company, Ltd., London, England; Continental Casualty Company which is a subsidiary of CNA Financial Corporation, Chicago, Illinois; Hartford Fire Insurance Company which is a subsidiary of International Telephone and Telegraph Corporation, New York, New York; Industrial Indemnity Company which is a subsidiary of Crum & Forster, New York, New York; Maryland Casualty Company which is a subsidiary of American General Insurance Company, Houston, Texas; Reliance Insurance Company which is a subsidiary of Reliance Group, New York, New York (formerly Leasco Corporation); Royal Indemnity Company which is a subsidiary of Royal Insurance Company, Ltd., Liverpool, England; St. Paul Fire and Marine Insurance Company which is a subsidiary of The St. Paul Companies, Inc., St. Paul, Minnesota; Security Insurance Company of Hartford which is a subsidiary of The Security Corporation, Hartford, Connecticut, which is a wholly-owned subsidiary of Textron, Inc., Providence, Rhode Island; The Travelers Indemnity Company which is a subsidiary of The Travelers Corporation, Hartford, Connecticut; and United States Fire Insurance Company which is a subsidiary of Crum & Forster, New York, New York.

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OCTOBER TERM, 1982

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit, printed in the separate Appendix hereto, *infra,* has been reported at 681 F.2d 186. The opinion of the United States District Court for the Western District of North Carolina, Charlotte Division,

printed in the separate Appendix[2] hereto, not yet officially reported, is unofficially reported at 16 Avi. Cases 17,592. Two earlier decisions rendered herein on the issue of disqualification of Government counsel are reported at 438 F. Supp. 886 (W.D. N.C. 1977), *reversed*, 570 F.2d 1197, *cert. denied*, 411 U.S. 986 (1978).

Jurisdiction

The judgment of the Court of Appeals was entered on June 4, 1982. A timely petition for a rehearing *in banc* was denied on August 19, 1982 and this petition for certiorari was filed within the extended time authorized by order of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statement of the Case

Petitioners are liability insurers of Eastern Air Lines, Inc., and hull insurers of Capital Management Corporation, the owner/lessor of a Douglas DC-9-31 aircraft, which while being operated as Eastern Flight 212 (EA 212), on September 11, 1974, crashed on approach to Douglas Municipal Airport, Charlotte, North Carolina. Eastern's liability insurers settled numerous claims and lawsuits arising out of the accident for $21,786,457.72, and the hull insurers paid $3,281,000 for the destruction of the aircraft (JA-1, 124-31). Petitioners then commenced the instant contribution action against the United States, three air traffic controllers (Messrs. Hare, Hogan and Hunter) at the Charlotte Tower who were providing air traffic control services to EA 212 at the time of the accident, and the Chief of the Charlotte Tower (Mr. Groseclose).

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[2]"Appendix" references are to the separate Appendix hereto. "JA" references are to the Appendix filed in the Court of Appeals and "AE" to the Appendix of Exhibits. The Roman numeral following the hyphen refers to the volume number and the digit following the comma is a page reference within said volume. Petitioners have been advised by the Clerk of the Court of Appeals, that the record below should not be forwarded to this Court unless requested.

The District Court consolidated petitioners' action with three passenger cases pending against Eastern Air Lines, for discovery and trial, but indicated that it would reconsider trial consolidation upon completion of discovery (JA-1, 190-93). After discovery, petitioners and Eastern moved to sever the cases and urged the District Court to have two trials, one involving the remaining passenger cases against Eastern—*Arnold, Mihalek*, and *Weston*—and the other the contribution claims of petitioners and Eastern against the respondents. The District Court denied both motions to sever, but stated that it would ask the jury to render an advisory verdict against the United States (JA-1, 332-40).

At trial, petitioners and Eastern conceded that the EA 212 flight crew was negligent but contended that respondents were also negligent, and liable for contribution, in that although the air traffic control radarscopes displayed EA 212's altitude, respondents did not advise the flight crew that EA 212 had descended below minimum altitude, and respondents watched in silence as EA 212 flew into the ground; petitioners also contended that the individual respondents were improperly trained and supervised. Respondents denied these allegations, contending that the sole proximate cause of the crash was the flight crew's negligence.

After petitioners rested, the District Court inexplicably reversed its previous position and announced that it would not ask the jury for an advisory verdict as to the liability of the Government. No explanation was given to the jury even though the Court had previously told the jury that they would render a verdict as to the liability of the Government. On November 24, 1979, the jury returned substantial verdicts for plaintiffs in the *Arnold, Mihalek* and *Weston* cases, and returned a verdict of no punitive damages against Eastern and no liability as to respondents Groseclose, Hare, Hogan and Hunter (JA-1, 377-79).

On March 12, 1980, the District Court entered its findings and conclusions as to the Government, holding that it was not

negligent and dismissing petitioners' complaint (JA-I, 481-524). Petitioners' motion for judgment n.o.v. or a new trial of the claims against the individual respondents was denied, and judgment was entered in respondents' favor (JA-I, 381-98, 478-524).

The issues raised by petitioners on appeal were that the District Court's findings that the Government was not negligent were clearly erroneous; petitioners were prejudiced by improper remarks of opposing counsel and their witness; the District Court committed reversible error in the charge; it was prejudicial to consolidate petitioners and the passenger actions for trial; and the District Court erred in excluding evidence relating to improper training and supervision of the individual respondents.

On June 2, 1981, petitioners' appeal, which was consolidated with appeals filed by Eastern, was orally argued, and on June 4, 1982—*one year and two days later*—a panel of the Court of Appeals rendered its 64-page opinion unanimously affirming the dismissal of petitioners' complaint, affirming by a majority the judgments against Eastern in *Arnold* and *Mihalek*, but reversing the judgment against Eastern in *Weston*.

Both Eastern and petitioners filed timely motions for rehearing *in banc* in the Court of Appeals. Petitioners' petition for rehearing was denied on August 19, 1982. On November 16, 1982 petitioners' time to file the instant petition was extended by Chief Justice Burger to January 14, 1983.

On December 23, 1982, by a 5-4 vote with one active judge recusing himself, the Court of Appeals granted Eastern's petition for rehearing *in banc*, but reserved decision as to the correctness of the granting until after briefing and argument (Addendum annexed hereto).

It would appear appropriate that this Court not issue a final decision on the instant petition for certiorari until the Court of Appeals decides Eastern's petition for rehearing. If the Court

of Appeals denies Eastern's petition, Eastern will probably petition to this Court, and if the Court of Appeals reverses the Panel below, their opinion will probably be applicable to this Court's consideration of the instant petition.

REASONS FOR GRANTING THE WRIT

1. The behavior of opposing counsel during the course of trial was so unacceptable that the failure of the Court of Appeals to condemn such misbehavior will alter the accepted and usual course of judicial proceedings in the federal courts.

The opinion by the Court of Appeals herein will eventually be read by every law student in the nation as part of a legal ethics course. Every professor who teaches such a course will universally condemn the majority opinion, and cite the trial behavior of counsel therein as examples of how an attorney should not act. Unfortunately, every student will file the case away as the ultimate example of "what you can get away with" in the courtroom.

Judge Murnaghan, in his dissenting opinion in the Court of Appeals, referred to opposing counsel's behavior as "abusive and overreaching". Statements by opposing counsel were characterized as "blatantly improper brayings" and "egregiously unprofessional utterances". Judge Murnaghan was of the opinion that the gross abuses were a direct result of how the District Court handled the trial:

> "In sum, it seems that Judge McMillan was carried away with enthusiasm for the seeming reasonableness and efficiency of his consolidation plan. He was so committed to it that he could not bring himself to abandon it, even when outrageous excesses by counsel for the individual plaintiffs turned trial to travesty.

> What appears to have happened is that counsel for the three plaintiffs and for the government, learning the district judge's final determination that there was to be one trial and one trial only, knew that they could safely practice gross abuses, in the certain knowledge that they ran no risk that the district court would employ that extreme, but ultimately efficacious, sanction, namely declaration of a mistrial." (Appendix A46)

Judge Murnaghan concluded:

> "In the majority's opinion we observe an open invitation to outrageous misbehavior by trial lawyers.
>
> * * *
>
> Counsel now are insulated from any adverse consequences of utterly unprofessional conduct so long as they are careful to keep invectives in the gutter. The majority places its *imprimatur*, its *nihil obstat* upon uninspired flights of invective. . . . The maintenance of proper court room standards has suffered a grievous blow from this day's work. I pray for its recovery." (Appendix A47)

The abusiveness of the trial behavior herein can only be appreciated by a brief description of some of the highlights of the prejudicial remarks by opposing counsel.

Counsel for the respondents (Mr. Pangia) started early during the trial when on jury selection he referred to the fact that the individual respondents were being sued "personally for $35,960,686.50 plus interest", that the individual respondents lived and worked in the area except for Mr. Hunter who used to live there; that the individual respondents had wives and children, and that one of Mr. Hunter's children recently died of leukemia (JA-II, 615).

On opening statement, one of plaintiffs' counsel (Mr. Smiley) implied that petitioners' claim for contribution was not what "you would expect to hear from a corporation that is sorry for what it did" (JA-II, 648-49).

On opening statement the respondents' attorney again referred to the fact that each of the individual respondents was being sued for over $35 million (JA-II, 663-64). The claim for contribution was referred to as "a lot of folly", and the attempt was initiated to mislead the jury into believing that the only issue they had to decide was whether the individual respondents flew the airplane into the ground (JA-II, 664).

During the trial the respondents' attorney made a point of advising the jury that a large portion of the insurance risk was insured by two foreign insurance groups. A motion to strike his remarks was denied (JA-VI, 2585).

In his closing argument, the attorney for the respondents disregarded all the rules in his plea to the jury. For example, he implied that the individual respondents had not been allowed to "forget this accident" because of lengthy depositions (none of which were in evidence and in any event would be irrelevant) (JA-VI, 2685). He then proceeded to tell the jury that he was "very angry"; that the claim alleged by Eastern was a "lack of accountability" and that Eastern was trying to "pass the buck"; and that Eastern was trying to get the jury to believe that the individual respondents "helped fly that plane into the ground" (JA-VI, 2686).

Mr. Pangia then argued that Eastern Air Lines should not talk about "fairness" because they sued the individual respondents for $35 million plus interest plus costs; that Eastern wants the individual respondents to pay for the costs of "this whole shooting match"; that Eastern was "just a little poor airline" though they offered to buy National Airlines; and that Eastern figured the individual respondents "could borrow" the $35 million (JA-VI, 2687).

Going forward with his tirade, Mr. Pangia claimed that Eastern was "dragged into the courtroom" because "they did not want to pay" and that the "passengers had to sue them" (JA-VI, 2687-

88). Again he alleged that Eastern was trying "to pass the buck to these air traffic controllers" and that Eastern's attorney was "rightfully" "ashamed of it" because it was unfair "doing what they're trying to do to these people for doing their job" and that the plaintiff passengers were "honest" in not suing the individual respondents (JA-VI, 2688).

Mr. Pangia then accused the petitioners of trying "to get somebody else involved" so as "to recoup" some losses and "pass it off to someone else" (JA-VI, 2688). The contribution suit was described as an effort "to stick it to these gentlemen for 36 million dollars" and to "put it on the air traffic controllers" (JA-VI, 2689, 2693).

The jury was told that Mr. Hunter "has lived with this nightmare for three years" and that for doing his job "his reward" is a lawsuit for three years and $35 million, plus interest and costs (JA-VI, 2697), and that Mr. Pangia was "worried" and that it was "frightening" that Eastern was asking why the individual respondents did not do their job (JA-VI, 2700).

Eastern's cross-examination of various witnesses was placed in the context of "they haven't learned" by Mr. Pangia (JA-VI, 2702-03). Eastern's defense was likened to that of a "bank robber" and that such a defense was "an attitude endorsed by a major corporation of coming in here and trying to pull a cop-out." Mr. Pangia then told the jury that to "tolerate" such an attitude was "the beginning of the end" (JA-VI, 2705-06). Such an "attitude" by Eastern Air Lines was described as a "monster on the loose" (JA-VI, 2706-07).

Mr. Pangia then accused Eastern of misuse of a product, suing the individual respondents for $35 million and "[t]he reason it hurts, the reason for the spite is this monster on the loose" (JA-VI, 2708).

In a final outburst, Mr. Pangia referred to Eastern and petitioners' attorneys as "the gang" and pleaded with the jury to

"end this three year nightmare for these gentlemen. Their reputation in the community, facing their families, you know what it's like to go home with a lawsuit like that to live with for three years. They have been literally held as hostages for three years. Try to go to a bank and make a loan, try to buy a car and have to explain . . . end the nightmare, please" (JA-VI, 2709).

This blatant appeal by Mr. Pangia to the passion and prejudice of the jury obviously had no place in an American courtroom, and should not have been condoned either by the District Court or the Court of Appeals. Unfortunately, the failure of the District Court to censure Mr. Pangia only encouraged the plaintiffs' attorneys to engage in similar tirades. Mr. Smiley quoted with approval the argument that Eastern's and petitioners' suit for contribution was an attempt "to shift responsibility for this crash to the air traffic controllers" (JA-VI, 2744). He also argued that Eastern was presenting a "cop-out" defense and then he presented his own personal assessment that the respondents were not sued because they were not liable and it would be a breach of counsel's duty "as officers of the court" to sue someone who was not responsible (JA-VI, 2747, 2748-49).

The final tirade was presented by plaintiffs' counsel, Mr. Diehl, who started right off by clapping his hands in mock applause of the attorneys for Eastern and petitioners, and telling the jury that they were "the best Eastern's money can buy" (JA-VI, 2749-50). He then pretended to place a keg of dynamite under the table where Eastern and petitioners' attorneys were sitting and blow-up "the gang" (JA-VI, 2751-52).

Mr. Diehl then asked the jury to imagine "being fried in Eastern Airlines' kerosene and how that feels," and suggested that Eastern's counsel would have preferred that Mr. Arnold had not gotten out of the aircraft (JA-VI, 2755).

Not being content with just telling the jury of the injuries his client suffered, and that Mr. Arnold was "peeled, skinned alive

and watching it" (JA-VI, 2758), Mr. Diehl found it necessary to discuss Eastern's and petitioners' case against the respondents. According to Mr. Diehl the claim for contribution was "most illogical," Eastern's bad joke, a "cop-out," and a poor "attitude." He attributed to Eastern's counsel a description of the individual respondents as "murderers' row" and that they wanted "to put the blame on somebody else." That Eastern was suing the individual respondents for "all the carnage and horror" that it caused. That the actions by Eastern and petitioners in filing a suit for contribution "made Scott Crossfield sick" [plaintiffs' expert witness], made Mr. Diehl sick, and he hoped that it would make the jurors sick (JA-VI, 2760).

Mr. Diehl then proceeded to describe the contribution claim as "outrageous" and the "ultimate disgrace of failure to accept responsibility" (JA-VI, 2761). Petitioners' and Eastern's expert witnesses were personally disparaged by allegations that they had "bionic ears" and suggestions that they would say anything for $40 an hour (JA-VI, 2761).

Mr. Diehl then expressed his own opinion on the credibility of one of petitioners' witnesses by stating "I don't think there was a bit of merit in anything he said" (JA-VI, 2761).

Not content with his attack on expert witnesses, Mr. Diehl found it necessary to describe the President of Eastern Air Lines (Frank Borman) as "pompous", a "new-found hero" with a "luminiscence" and a "glow" (JA-VI, 2763), and when Mr. Diehl's behavior was questioned by Eastern's counsel, his response was that he wanted to scream at and "whack" the attorney for Eastern Air Lines (JA-VI, 2766).

Based upon the foregoing, petitioners would submit that the trial judge permitted closing argument by Messrs. Pangia, Smiley and Diehl to become a three-ring circus, and that their vituperation constituted an unconscionable appeal to the passion and prejudice of the jury. In such a situation, the law is well estab-

lished that the Court of Appeals should have reversed and remanded petitioners' case for a new trial. *See New York Central R.R. Co.* v. *Johnson*, 279 U.S. 310, 317, 319 (1928); *Draper* v. *Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978); *Gilbert* v. *Gulf Oil Corp.*, 175 F.2d 705 (4th Cir. 1949) (judgment was reversed because of improper arguments by counsel that appealed to local prejudice by repeated references to out-of-state insurance companies as being the interested parties); *Accord, London Guarantee & Accident Co.* v. *Woelfle*, 83 F.2d 325, 338-44 (8th Cir. 1936); *Foster* v. *Crawford Shipping Co.*, 496 F.2d 788, 792 (3d Cir. 1974); *Pingatore* v. *Montgomery Ward & Co.*, 419 F.2d 1138 (6th Cir. 1969), *cert. den.*, 398 U.S. 928 (1970) (counsel's antics during closing argument required reversal); *San Antonio* v. *Timko*, 368 F.2d 983 (2d Cir. 1966) (calling the defendant a villain and making personal attacks on the character of defense counsel required reversal); *Missouri-K.T.R. Co.* v. *Ridgway*, 191 F.2d 363 (8th Cir. 1951) (unwarranted denunciations of defendant and its counsel required reversal); *Crowell-Collier Pub. Co.* v. *Caldwell*, 170 F.2d 941, 944-45 (5th Cir. 1948) (error by the trial judge in permitting a "public gladiatorial exposition"); *Aetna Life Ins. Co.* v. *Kelley*, 70 F.2d 589, 594-95 (8th Cir. 1934) (intemperate remarks concerning defendant's witnesses required reversal).

Likewise, attempts to appeal to the relative wealth of the parties, the family status of one of the parties, or the improper reference to children has been held to be prejudicial error. *Draper* v. *Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978); *Edwards* v. *Sears, Roebuck & Co.*, 512 F.2d 276, 285-86 (5th Cir. 1975); *Washington-Annapolis Hotel Co.* v. *Riddle*, 171 F.2d 732, 740 (D.C. Cir. 1948); *Chicago, St. P., M. & C.R. Co.* v. *Arnold*, 160 F.2d 1002, 1008 (8th Cir. 1947).

Furthermore, counsel taking a personal position before the jury on the merits of the case or the testimony of a particular witness is prohibited by the North Carolina Code of Professional Responsibility:

"DR 7-106(c) In appearing in his professional capacity before a tribunal, a lawyer shall not:

> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant . . . ; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." 4A N.C. Gen. Stat. Append. VII (Supp. 1977).

Failure to follow the Code of Professional Responsibility by making improper statements to the jury has been held to be reversible error. *Draper* v. *Airco, Inc.*, 580 F.2d 91, 95-96 (3d Cir. 1978); *United States* v. *Diharce-Estrada*, 526 F.2d 637, 641-42 (5th Cir. 1976); *Greenberg* v. *United States*, 280 F.2d 472, 474-75 (1st Cir. 1960); *McMillian* v. *United States*, 363 F.2d 165, 168-69 (5th Cir. 1966).

The "out-of-bounds" behavior of opposing counsel was mirrored in the deliberate set-up of one of plaintiffs' expert witnesses wherein he was allowed to tell the jury in response to his counsel's question as to why he was testifying:

> "I came back because I learned that day that these accidents still hadn't got the airlines' attention and that they were trying to cop-out by blaming the controller, and as an aviator I could not abide that kind of cynical reaching for the pits." (JA-IV, 1660-61)

This set-up remark by the witness that a valid claim for contribution was a "cop-out" that he "could not abide" was extremely prejudicial and the failure of the District Court to strike the entire statement and instruct the jury to disregard it should have been reversible error. *See Beck* v. *Wings Field, Inc.*, 122 F.2d 114 (3d Cir. 1941); *United States* v. *Conley*, 503 F.2d 520 (8th Cir. 1974); *cf. United States* v. *Andrea*, 538 F.2d 1255 (5th Cir. 1976).

The prejudice of this witness' remarks eventually culminated in the ultimate prejudice of all–the District Court's refusal to instruct the jury as to what a contribution suit was all about (JA-VI, 2802-03). Without any guiding instructions from the Court, a claim for contribution was just a "cop-out" as far as the jury knew.

To compound the prejudicial nature of the failure to properly charge, the District Court had told the jury at the start of the trial that they would render a verdict on the liability of the Government (the jury was not told that their verdict would be advisory). After petitioners presented their case, the District Court Judge told counsel he had changed his mind and would not ask for an advisory verdict, but that he would give an instruction that if the jury found the controllers liable, the Government would be liable under *respondeat superior*. After closing argument, the Court refused to give the charge as previously stated. The jury was never told why they were no longer passing on the liability of the Government. The charge by the District Court was a disgrace.

Despite all of the above, the majority and dissenting opinions in the Court of Appeals found no prejudice to petitioners, apparently on the basis that the jury was not prejudiced by the improper arguments of counsel (majority view), and that since the claim against the Government was non-jury and the Government was exonerated by Judge McMillan, the provisions of 28 U.S.C. §2676 would bar a retrial against the individual respondents (minority view).

The reasoning followed by the Court of Appeals completely overlooks the effect that the improper arguments had on the jury. It ignores the fact that if the trial behavior of opposing counsel had been controlled and the jury properly instructed on the law, *a jury verdict against the individual respondents would have required a directed verdict against the United States.*

The negligence of the individual respondents was blatant–

indeed the failure of the Court of Appeals to even mention the factual and legal claims against the Government in its opinion should be cause for shame.[3] Nevertheless, the evidence was undisputed at trial that on its approach to the runway for landing, EA 212 was required to pass a point in space called the Ross Intersection at an altitude of 1,800 feet. EA 212 crossed this point, but at an altitude 500 feet lower than the compulsory 1,800 feet crossing altitude. Respondent Hunter, who had a radar which displayed EA 212's altitude, testified that if he had been aware that EA 212 was 500 feet below the minimum crossing altitude at Ross, he would have called that to the attention of the flight crew, but that he failed to notice EA 212's altitude when he looked at the radarscope:

> "Q. So when you looked at Ross, looked at Eastern 212 that last time and saw it in the vicinity of Ross, if you had observed that 212 was crossing Ross at a 1,300 foot altitude, based upon the readout, you would in some way call it to the attention of the crew of 212. Is that right?
> A. I believe I would have, yes, sir.
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> * * * *

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[3]This Court is referred to the excellent speech by Judge Bernard S. Meyer of the New York Court of Appeals on "The Need for Reasoned Judicial Opinions" given before the American Law Institute on May 19, 1982 in Philadelphia and reprinted at page 2 of the ALI-ABA CLE Review of September 24, 1982 (Vol. 13, No. 39). In that speech Judge Meyer pointed out ". . . that Courts must not only do justice, but also that it must *appear* that justice is being done . . . the parties and the public are entitled to know on exactly what basis the judge or judges acted. * * * *Justice on Appeal* tells us that 'every decision of an appeal . . . should be accompanied by a statement of reasons, however brief'. This means not only abolishing the 'affirmed, no opinion' entry . . . but requiring that findings of essential facts and reasons for the decision be stated. It also means not only articulation of reasons rather than simply stating conclusory euphemisms, but, further, being candid about both the derivation of judicial powers and deviations from previously declared substantive rules."

In the instant case the Court of Appeals devoted all of one paragraph to conclusory euphemisms affirming the decision against petitioners. 681 F.2d at 205-06.

Q. Now, sir, can you tell the Court and the jury why, if you looked at the radarscope at about the time that Eastern 212 crossed Ross, why you didn't notice that he was at an altitude some 500 feet below the minimum crossing altitude and bring that fact to the attention of the crew?

A. Well, it's very simple. I'm separating airplanes. I'm separating radar targets. The aircraft that was to follow 212, I had to make sure before I turned him on the final approach course that he was at least three miles behind the target, the radar target of Eastern 212; so I glanced like that, just flipped the eyes over at the radar target, which I saw approaching Ross. I had no need at that time to utilize the information of either the ground speed nor the altitude of Eastern 212 to separate him from any other airplane; therefore, I wasn't watching for it. I was looking to see where the radar target was in order that I could have three miles fore and aft.

Q. So your testimony is that you looked but you didn't see it?

A. That is correct, sir." (JA-V, 2258-59).[4]

The foregoing testimony by Mr. Hunter clearly established the negligence of the Government since under North Carolina law an individual who is under an obligation to keep a lookout

---

[4]The controllers in the tower cab, including respondents Hare and Hogan, also were aware of EA 212's low altitude but had failed to issue a warning to the aircraft. The following extracts appeared upon the air traffic control tapes:

1131:12 You see that Eastern? (AE-II, 568 (Ex. 5138)).
1133:57 Holy Christ! (AE-II, 569 (Ex. 5138)).
1133:57 . . . Who's that? . . . They're down . . . (AE-II, 551 (Ex. 5136), JA-VI, 2577).
1134:21 Holy Christ, where did he go? (AE-II, 551 (Ex. 5136)).
1134:43 I just cleared him. (AE-II, 551 (Ex. 5136)).
1134:48 I'm telling ya, Hare did that. (AE-II, 552 (Ex. 5136)).
1136:19 You could tell he was in trouble. (AE-II, 569 (Ex. 5138)).

Based upon these statements, it was absolutely clear that the controllers in the Tower Cab knew before the accident that EA 212 "was in trouble" and they should have issued a warning.

is "held to the duty of seeing what he ought to have seen." *Wall* v. *Bain*, 222 N.C. 375, 379, 23 S.E.2d 330, 333 (1942); *Raper* v. *Byrum*, 265 N.C. 269, 274, 144 S.E.2d 38 (1965). As the Court of Appeals held in *Rundle* v. *Grubb Motor Lines, Inc.*, 300 F.2d 333, 338 (4th Cir. 1962): "It was [appellee's] duty to keep a lookout and to see what was to be seen." Similarly, as the Court of Appeals for the Tenth Circuit held in *United States* v. *Murray*, 463 F.2d 208, 210 (10th Cir. 1972):

> "The next question is whether or not the failure of the attendant on duty to hear at least three passes amounts to negligence proximately causing the accident. We agree with the trial judge that it does. Watching and listening for just such requests for runway lighting was part of his job according to his own statement, and we think that in the careful discharge of this duty three passes should have been enough to attract his attention. He testified that it was difficult to hear planes overhead from inside the service station, a possible, even probable, explanation of his failure to hear the plane earlier, but not an excuse."

With this clear cut evidence of negligence,[5] the only explanation for the jury exoneration of the individual respondents is the prejudicial comments by opposing counsel and the failure of the District Court to explain to the jury that a valid claim for contribution was not a "cop-out" or a "lack of accountability" or a "monster on the loose".

If the jury had returned a verdict against the individual respondents, then petitioners would have moved for a directed verdict since it was admitted by the Government that at all times

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[5]Petitioners submit that if a driver drove through a stop sign and ran into another car, his explanation that he looked but didn't see the stop sign would be laughed out of court. Here the District Court elevated such an argument to a meritorious defense by writing an opinion that had no evidentiary support in the record. The failure of Judge Phillips in the Court of Appeals to analyze the facts or the law in light of petitioners' 75-page brief on the merits is inexplicable.

the individual respondents were acting within the course and scope of their employment.

> "Under the doctrine of *respondeat superior* the master, or employer, is liable for the negligent acts or omissions of his servant, or employee, while acting as such and within the 'scope of his employment'. . . . Unless there is no material issue of fact as to whether the employee was acting within the scope of his employment . . . the question will be submitted to the jury."

Thomas v. *Poole*, 45 N.C. App. 260, 262, S.E.2d 854, 856, *petition denied*, 300 N.C. 202, 269 S.E.2d 628 (1980). *See also Jackson* v. *Mauncy*, 260 N.C. 388, 132 S.E.2d 899 (1963); *Kiser* v. *Neumann Co. Contractors*, 426 S.W.2d 935, 938 (Ky. 1967); *Restatement (Second) of Agency* § 219(1). Indeed, as stated by the Fourth Circuit in its earlier decision in this litigation:

> "As heretofore noted, the plaintiffs allege, and the Government admits, that the controllers were acting within the course and scope of their employment at the time of the crash, and under such circumstances *any finding of negligence against them would be imputable to the Government and place liability upon it under the Tort Claims Act.*"

Aetna Cas. & Sur. Co. v. *United States*, 570 F.2d 1197, 1201 (4th Cir.), *cert. den.*, 439 U.S. 821 (1978). (emphasis added)

It is thus apparent that the prejudicial statements of opposing counsel, which went uncorrected by the District Court were directly responsible for the jury's verdict and in turn prevented petitioners from obtaining a directed verdict against the respondent United States. Once the jury verdict was returned, the District Court did not have the courage to condemn the abuses and set the verdict aside, and the Circuit Court's tragic *apologia* is destined to become a law professor's delight and the unethical trial lawyer's favorite citation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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New York, N. Y. 10004
Counsel for Petitioners

Of Counsel

PETER HOENIG
ALAN D. REITZFELD

ADDENDUM

Clerk's Letter to Counsel Concerning Order Granting Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219

WILLIAM K. SLATE, II
CLERK

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December 27, 1982

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Clerk's Letter to Counsel Concerning Order Granting Rehearing In Banc

Re: 80-1245, 80-1246, 80-1247, 80-1334, Eastern Air Lines, Inc., et al vs. Richard Arnold, IV, et al

Dear Counsel:

Enclosed are two orders, one is granting the petition for rehearing en banc, the second one is establishing a briefing schedule for supplemental briefs. These cases are tentatively calendared for the rehearing at the February 1983 Session.

Sincerely yours,

WILLIAM K. SLATE, II

Carol R. Lemon
By: (Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL:fls
Encls.

Order Granting Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1245

RICHARD ARNOLD, IV

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 80-1246

FRANCIS C. MIHALEK,

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 80-1247

HELEN RAE WESTON, etc.,

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant.

Order Granting Rehearing In Banc

No. 80-1334

THE AETNA CASUALTY AND SURETY COMPANY, et al.,
Appellants,

versus

UNITED STATES OF AMERICA, et al.,
Appellees.

ORDER

The petition for rehearing and suggestion for rehearing in banc on behalf of Eastern Air Lines, Inc., and the responses thereto having been read and considered; a poll on the suggestion for rehearing in banc having been requested; and Judge Ervin having recused himself, Judges Winter, Russell, Widener, Murnaghan and Chapman having voted to grant rehearing in banc and Judges Hall, Phillips and Sprouse, together with Judge Butzner who voted before he took senior status, having voted to deny rehearing in banc, it is ORDERED that the petition for rehearing in banc is granted, subject to the condition that the parties file supplemental briefs, in accordance with a schedule to be fixed by the Clerk, on the issue of whether rehearing in banc has been properly authorized and be prepared to argue their views when the case is reached for reargument. *See, e.g.*, Zahn v. International Paper Co., 469 F.2d 1033 (2 Cir. 1972), *affirmed on other grounds*, 414 U.S. 291 (1973); Boyd v. Lefrak Organization, 517 F.2d 918 (2 Cir. 1975); Schenker v. Baltimore & Ohio RR., 374 U.S. 1, 4-5 (1963); Comment, *Federal Jurisdiction and Practice*, 47 St. John's L. Rev. 339, 348 (1972). After briefing and argument, the court will make a final ruling as to whether the rehearing in banc has been properly authorized.

FOR THE COURT

/s/ HARRISON L. WINTER
Chief Judge

Order Establishing A Briefing Schedule

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1245

RICHARD ARNOLD, IV

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 80-1246

FRANCIS C. MIHALEK,

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 80-1247

HELEN RAE WESTON, etc.,

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EASTERN AIR LINES, INC.,

Appellant.

Order Establishing A Briefing Schedule

No. 80-1334

THE AETNA CASUALTY AND SURETY COMPANY, et al.,
Appellants,

versus

UNITED STATES OF AMERICA, et al.,
Appellees.

ORDER

In accordance with the court's order of December 23, 1982 granting the petition for rehearing en banc,

IT IS ORDERED that:

1. the parties are directed to file supplemental briefs in accordance with the court's order on or before *January 19, 1983.*
2. the supplemental reply brief on behalf of the appellants and appellees shall be filed on or before *January 28, 1983.*

For the Court–By Direction.

/s/ WILLIAM K. SLATE, II
Clerk

Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1177

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYDS AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

-against-

UNITED STATES OF AMERICA, BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN AND DENNIS L. HUNTER,

Respondents.

MOTION TO DEFER CONSIDERATION OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

WALTER E. RUTHERFORD
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NEW YORK, NEW YORK 10004

COUNSEL FOR PETITIONERS

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYDS AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

-against-

UNITED STATES OF AMERICA, BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN AND DENNIS L. HUNTER,

Respondents.

MOTION TO DEFER CONSIDERATION OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

NOW COMES the Petitioners and respectfully moves this Court to defer consideration of petitioners' Petition for Writ of Certiorari, filed on January 14, 1983, until such time as the Court of Appeals for the Fourth Circuit has rendered a final decision on Eastern Air Lines' Petition for a Rehearing and Suggesting Rehearing in banc in petitioners' and Eastern's consolidated appeal to the Court of Appeals for the Fourth Circuit.

1. The question presented by petitioners in their Petition for Writ of Certiorari is:

Whether opposing counsel's conduct during trial, which was characterized by the dissenting Judge below as "outrageous misbehavior" and which rendered the trial a "travesty," and which was sanctioned by the majority opinion below, was such a departure from the accepted and usual course of judicial proceedings so that petitioners were denied a fair jury trial against the individual respondents and prejudiced in their case against the respondent United States.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Judgment of the Court of Appeals was entered on June 4, 1982. A timely Petition for a Rehearing in banc was denied on August 19, 1982. On December 16, 1982, an order was entered by this Court extending petitioners' time to file for writ of certiorari to January 14, 1983, and on January 14, 1982 petitioners filed their Petition for Writ of Certiorari.

3. This motion to defer consideration of petitioners' Petition for Writ of Certiorari is requested for the following reasons:

On June 2, 1981, petitioners' and Eastern's appeal was consolidated, and on June 4, 1982, the panel of the Court of Appeals rendered an opinion dismissing petitioners' Complaint and affirming, by majority, the Judgments against Eastern in two passenger cases but reversing judgment against Eastern in a wrongful death action.

Both Eastern and petitioners filed timely Petitions for Rehearing in banc in the Court of Appeals. However, since the Court of Appeals had not rendered a decision on

Eastern's Petition for a Rehearing on November 17, 1982, the original date for petitioners to file for writ of certiorari, this Court granted petitioner's motion and extended petitioners' time to file for writ of certiorari to January 14, 1983. On December 23, 1982, the Court of Appeals entered an order, annexed hereto as Appendix A, granting Eastern's Petition for a Rehearing in banc subject to the condition that the parties file supplemental briefs on the issue of whether rehearing in banc had been properly authorized and an order, annexed hereto as Appendix B, establishing a briefing schedule. In addition, the chief clerk of the Court of Appeals, by letter dated December 27, 1982, informed counsel that the cases had been tentatively calendared for the rehearing at the February 1983 session, and a copy is annexed hereto as Appendix C.

Although petitioners have filed their Petition for Writ of Certiorari, since both Eastern and petitioners raised the issue of counsel's outrageous misbehavior during trial on their appeals to the Court of Appeals, it would appear appropriate that this Court defer consideration of petitioners' Petition for Writ of Certiorari until such time as the Court of Appeals has rendered its final decision on Eastern's Petition for Rehearing in banc.

If the Court of Appeals denies Eastern's Petition for a Rehearing in banc, Eastern will probably petition to this Court, and if the Court of Appeals reverses the Panel below, their opinion will probably be applicable to this Court's consideration of petitioners' Petition for Writ of Certiorari.

WHEREFORE, petitioners respectfully pray that this Court defer consideration of petitioners' Petition for Writ

of Certiorari until such time as the Court of Appeals for the Fourth Circuit has rendered its final decision on Eastern's Petition for a Rehearing in banc.

Dated: New York, New York
January 18, 1983

Respectfully submitted,

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By Walter E. Rutherford
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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
DEC 23 1982
U. S. Court of Appeals
Fourth Circuit

No. 80-1245

Richard Arnold, IV, Appellee,

versus

Eastern Air Lines, Inc., Appellant,

versus

United States of America, Appellee.

No. 80-1246

Francis C. Mihalek, Appellee,

versus

Eastern Air Lines, Inc., Appellant,

versus

United States of America, Appellee.

No. 80-1247

Helen Rae Weston, etc., Appellee,

versus

Eastern Air Lines, Inc., Appellant.

No. 80-1334

The Aetna Casualty and Surety Company, et al, Appellants,

versus

United States of America, et al, Appellees.

APPENDIX A

ORDER

The petition for rehearing and suggestion for rehearing in banc on behalf of Eastern Air Lines, Inc., and the responses thereto having been read and considered; a poll on the suggestion for rehearing in banc having been requested; and Judge Ervin having recused himself, Judges Winter, Russell, Widener, Murnaghan and Chapman having voted to grant rehearing in banc and Judges Hall, Phillips and Sprouse, together with Judge Butzner who voted before he took senior status, having voted to deny rehearing in banc, it is ORDERED that the petition for rehearing in banc is granted, subject to the condition that the parties file supplemental briefs, in accordance with a schedule to be fixed by the Clerk, on the issue of whether rehearing in banc has been properly authorized and be prepared to argue their views when the case is reached for reargument. See, e.g., Zahn v. International Paper Co., 469 F.2d 1033 (2 Cir. 1972), affirmed on other grounds, 414 U.S. 291 (1973); Boyd v. Lefrak Organization, 517 F.2d 918 (2 Cir. 1975); Schenker v. Baltimore & Ohio RR., 374 U.S. 1, 4-5 (1963); Comment, Federal Jurisdiction and Practice, 47 St. John's L. Rev. 339, 348 (1972). After briefing and argument, the court will make a final ruling as to whether the rehearing in banc has been properly authorized.

FOR THE COURT

Harrison L. Winter

Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
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No. 80-1334

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versus

United States of America, et al., Appellees.

APPENDIX B

ORDER

In accordance with the court's order of December 23, 1982 granting the petition for rehearing en banc,

IT IS ORDERED that:

1. the parties are directed to file supplemental briefs in accordance with the court's order on or before January 19, 1983.

2. the supplemental reply brief on behalf of the appellant and appellees shall be filed on or before January 28, 1983.

For the Court - By Direction.

/s/ William K. Slate, II

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
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WILLIAM K. SLATE, II
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December 27, 1982

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Re: 80-1245, 80-1246, 80-1247, 80-1334, Eastern Air Lines, Inc., et al vs. Richard Arnold, IV, et al

Dear Counsel:

Enclosed are two orders, one is granting the petition for rehearing en banc, the second one is establishing a briefing schedule for supplemental briefs. These cases are tentatively calendared for the rehearing at the February 1983 Session.

Sincerely yours,

WILLIAM K. SLATE, II

Carol R. Lemon

By:
(Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL:fls
Encls.

APPENDIX C

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 1983, copies of this motion to defer consideration of petitioners' Petition for Writ of Certiorari were delivered by hand to the Solicitor General of the United States, 10th Street and Pennsylvania Avenue, N.W., Room 5614, Washington, D.C. 20530.

Walter E. Rutherford
Counsel for Petitioners

82-1177

Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYD'S AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN and DENNIS L. HUNTER,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WALTER E. RUTHERFORD
One State Street Plaza
New York, N. Y. 10004
Counsel for Petitioners

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1245

RICHARD ARNOLD, IV.,
Appellee,

versus

EASTERN AIR LINES, INC.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

No. 80-1246

FRANCIS C. MIHALEK,
Appellee,

versus

EASTERN AIR LINES, INC.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

No. 80-1247

HELEN RAE WESTON, as Executrix of the Estate of Lewis M. Weston, deceased,
Appellee,

versus

EASTERN AIR LINES, INC.,
Appellant.

No. 80-1334

The Aetna Casualty and Surety Company; Aetna Insurance Company; American Empire Insurance Company; Commercial Union Insurance Company; Compagnies D'Assurances Du Groupe; Concorde; Continental Casualty Company; Employers Mutual Liability Insurance Company of Wisconsin; Hartford Fire Insurance Company; Industrial Indemnity Company; Maryland Casualty Company; Reliance Insurance Company; Royal Indemnity Company; St. Paul Fire and Marine Insurance Company; Security Insurance Company of Hartford; The Travelers Indemnity Company; Underwriters at Lloyd's and Associated British Insurance Companies; United States Fidelity and Guaranty Company; United States Fire Insurance Company; Zurich Insurance Company,

Appellants,

versus

United States of America; Bernard C. Groseclose; Alden E. Hare; William L. Hogan; Dennis L. Hunter,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued June 2, 1981. Decided June 4, 1982

Before BRYAN, Senior Circuit Judge, PHILLIPS and MURNAGHAN, Circuit Judges.

William C. Raper (H. Grady Barnhill, Jr., Womble, Carlyle, Sandridge & Rice on brief) for Appellant Eastern Air Lines, Inc.; Walter E. Rutherford for Appellants Aetna Casualty and Surety Company, et al.; Gary S. Hemric, William K. Diehl, Jr. (Robert H. Sheppard, James McElroy & Diehl, P.A. on brief)

and Robert R. Smiley, III (Smiley, Murphy, Olson & Gilman on brief) for Appellees Richard Arnold, IV, Francis C. Mihalek and Helen Rae Weston; Michael J. Pangia, Assistant Chief Counsel, Litigation Division, Federal Aviation Administration for Appellees Groseclose, Hare, Hogan, Hunter, and United States of America.

PHILLIPS, Circuit Judge:

These consolidated appeals grow out of the crash of Eastern Airlines Flight No. 212 near Charlotte, North Carolina on September 11, 1974, which resulted in the deaths of 69 passengers and 2 crew members and serious personal injuries to 9 passengers and 2 crew members who survived. Four resulting lawsuits consolidated for trial generate these appeals. In Nos. 80-1245, 80-1246, and 80-1247, respectively, Eastern Airlines (Eastern) appeals the award of compensatory damages aggregating over $4 million to surviving passengers Arnold and Mihalek and the award of wrongful death damages of $797,000 to the personal representative of deceased passenger Weston, and in Nos. 80-1245 and 80-1246, Eastern appeals the denial of its third party claims for contribution against the United States of America in respect of the Arnold and Mihalek personal injury actions. In No. 80-1334 The Aetna Casualty and Surety Company and other insurers of Eastern (Aetna) appeal the dismissal, following trial to the court and jury respectively, of their action against the United States and four individual air traffic controllers for contribution in respect of their out of court settlements of claims by or on behalf of other crash victims and of a property damage claim for destruction of the aircraft. We affirm the judgment in all respects save the award of wrongful death damages in the Weston action; as to that we find reversible error and remand for a new trial.

I

Following the crash of Flight 212 the great bulk of the ensuing claims by and on behalf of surviving and deceased crash

victims were settled out of court by Eastern's insurers. A total of around $22 million was paid in these settlements, and another $3,281,000 was paid in settlement of the aircraft owner's property damage claim.

Not all the claims were settled however. In March and September, 1976, respectively, surviving passengers-plaintiffs Arnold and Mihalek commenced diversity actions against Eastern in the United States District Court for the Western District of North Carolina seeking, on allegations of negligence, compensatory and punitive damages for their personal injuries. In September 1976, plaintiff Helen Weston as Executrix of the Estate of deceased passenger Lewis M. Weston, commenced a diversity action in the United States District Court for the District of South Carolina seeking, on allegations of negligence, compensatory and punitive damages for the wrongful death of her decedent. In the Arnold and Mihalek actions (but not the Weston action) Eastern impleaded the United States on allegations of the concurring negligence of certain government employees on duty as air traffic controllers at the time of the crash, and sought on this basis contribution from the government in respect of Eastern's potential liability. In its responsive pleadings to the personal injury and wrongful death claims Eastern admitted liability for compensatory damages[1] but denied liability for punitive damages.

In February 1977 Aetna and the other insurers of Eastern commenced an action in the United States District Court for the Western District of North Carolina against the United States under the Federal Tort Claims Act, 28 U.S.C. §§1346 *et seq.*, and against four federal air traffic controllers under North

[1]The fault specifically admitted by Eastern as the basis for its liability was the "failure of the pilots to be aware of the plane's altitude immediately prior to the crash." On trial the exact nature of this fault was amplified by specific evidence—mainly that preserved by on-board and airport recorders—of pilot inattention and carelessness which the trial judge characterized, with full support from the record, variously as "a shocking lack of attentiveness," "unattentiveness and carelessness of a truly extraordinary nature," "not simply inadvertent but grossly negligent."

Carolina common law, alleging concurring negligence by these defendants and seeking on that basis contribution[2] in respect of amounts paid by the insurers in making the out of court settlements noted above.

After all four of these actions[3] had been transferred to the Charlotte Division of the Western District of North Carolina under the guidelines for complex and multi-district litigation, the district court, in early November 1977, *sua sponte* ordered them consolidated for discovery and trial, subject to reconsideration as to the trial aspect following the completion of discovery. Discovery then proceeded in the consolidated actions until mid-October, 1979. Shortly after completion of discovery Eastern and Aetna moved to sever the Aetna action for trial in order to avoid prejudice to Eastern. After considering alternative proposals respecting the appropriate procedure, the district court denied the motion for severance, and the consolidated actions proceeded to trial.

Following a three-week trial to court and jury,[4] the jury, after seventeen hours of deliberation, returned verdicts awarding substantial compensatory damages, but denying any punitive damages, on the Arnold, Mihalek and Weston claims and finding the air traffic controllers not liable on Aetna's claim for contribution. Arnold was awarded $3,027,500; Mihalek,

[2]The claim as originally pleaded included full indemnification as an alternative on the basis of primary negligence of the air traffic controllers. This alternative was abandoned before trial.

[3]Along with two other actions by airline stewardesses against the United States that were settled before trial.

[4]The trial format established by the court before trial provided for trial of all the claims to the jury whose verdicts however were only to be advisory with respect to Eastern's third-party and Aetna's direct contribution claims against the United States. As to those non-jury claims, judgment would be entered upon the court's findings and conclusions. Though trial proceeded on this assumed basis down to submission, the court declined at that point to submit the claims against the United States to the jury for an advisory verdict. *See* Part III, *infra*.

$1,137,500; and Weston's representative, $847,000. Following briefing and argument of various post-trial motions by the parties, the district court declined to disturb the jury verdicts in any save one particular. On the Weston wrongful death verdict the court determined that it had erred in submitting pain and suffering to the jury as a compensable item of damages and, to correct this error, ordered a remittitur of $50,000, reducing the award to $797,000, which the plaintiff accepted. As so reduced, the court let this verdict stand. On Eastern's third party claim and Aetna's separate claim against the United States for contribution that were tried to the court non-jury, the court made findings of fact and conclusions of law against the claimants, finding the United States not liable for contribution on either claim.

From the final judgment in favor of the personal injury and wrongful death claimants on their claims and against Eastern and Aetna on their respective cross-claim and claim for contribution, Eastern and Aetna have appealed. They assign a number of errors, some commanding more discussion than others; to which we now turn. Further background facts and details of the proceedings will be developed as needed in discussing particular assignments of error.

II

Eastern's three principal assignments of error—two of which are paralleled in Aetna's assignments—all relate ultimately to the amount of compensatory damages awarded in the personal injury and wrongful death actions. Though subject to independent analysis, the errors asserted are in the end so interrelated that we will discuss them as a discrete cluster.[5]

[5]Though these assignments run to the Weston wrongful death judgment as well as to the two personal injury judgments, we discuss them here only in relation to the latter in view of our remand of the wrongful death action on other grounds. *See* Part IV, *infra*.

Both Eastern and Aetna complain first, in chronological terms, of the refusal of the court to sever the originally consolidated actions into two separate trial units: one consisting of the main claims against Eastern together with Eastern's two related third party claims for contribution against the United States; the other, of Aetna's action for contribution against the United States and the four individual air traffic controllers. Eastern claims that consolidated trials (the denial of severance) resulted in prejudicially inflated damage awards against it; Aetna, that it resulted in the introduction into its case of prejudicial irrelevances related to Eastern's culpability; and that indeed there were not between the two units sufficient common issues to permit consolidation under Rule 42(a).

Eastern and Aetna then join in complaining of grossly improper conduct by opposing counsel[6] in making comments and arguments directly to, and in the presence of, the jury. These, they claim, were not adequately corrected by the trial judge and, in consequence, resulted in demonstrable prejudice: to Eastern in the form of prejudicially inflated damage awards; to Aetna, by unfairly prejudicing the jury in respect of the *bona fides* of the insurers' claim for contribution.

Eastern additionally assigns as error the trial judge's refusal to set aside the damage awards as being excessive and the result, however excited, of passion and prejudice.

We take these in order and in combination.

A

The proper starting point for assessing this cluster of assigned errors is the district court's decision to try these four actions

[6]Coupled with contentions of counsel misconduct is one of misconduct by plaintiffs' witness Crossfield, a former Eastern vice-president. We have considered that contention and finding it without merit do not further discuss it here.

and the third party claims incident to two of them as a single unit. This set the stage for all now challenged that followed.

Assessed for its independent effect upon the judgments appealed from, we find no reversible error in the decision to deny the motions to sever. The decision whether to sever or to consolidate whole actions or sub-units for trial is necessarily committed to trial court discretion. We review only to determine whether the discretion was abused, *Bowie* v. *Sorrell*, 209 F.2d 49, 51 (4th Cir. 1953); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1013 (5th Cir. 1977), and if so, whether prejudice resulted. Here we find no abuse.

When the motions to sever were made some twelve days before trial, Eastern and Aetna contended that a consolidated trial would necessarily prejudice both of them: Eastern, by the necessary revelation to the jury of the fact and apparent scope of its insurance coverage; Aetna, by allowing evidence of Eastern's allegedly gross culpability to influence the jury in deciding whether any other party should, in view of such gross culpability, share Eastern's (hence Aetna's) burden of liability. To avoid the predicted prejudice they suggested two alternative procedures. First, as a *quid pro quo* for severance of the *Aetna* action, Eastern would abandon its third party claims for contribution against the United States in the two passenger actions thereby foregoing in these actions at least any right of its insurers to contribution in respect of these two litigated claims. Alternatively, in a consolidated trial of all the actions, specific steps could be taken to screen from the jury any knowledge that Eastern had liability insurance coverage or that any settlements of other claims by its insurers had occurred. Counsel for Aetna and Eastern would be introduced as co-counsel for Eastern, no mention of liability insurance would be allowed, and the jury would be informed only of the interests involved in the passenger claims against Eastern and in Eastern's related third party claims for contribution.

The risks of prejudice and possible confusion as identified by the appellants were obvious ones which in the exercise of a sound judicial discretion the district court was obliged to weigh. *See Molever* v. *Levenson*, 539 F.2d 996 (4th Cir. 1976). Failure carefully to consider them and the alternative procedures advanced by appellants as a means of avoiding them may well have constituted an abuse of discretion. But the record shows that they were carefully weighed, both in absolute terms and in relation to countervailing considerations also necessary to sound decision. The critical question for the district court in the final analysis was whether the specific risks of prejudice and possible confusion were overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives. *See* Fed. R. Civ. P. 42; *see generally* 9 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* §2383 (1971).

In this case it could not seriously be contended that the purely logistical factors—time, expense, travel burdens, etc.—did not militate in favor of a consolidated trial. Eastern and Aetna have made no such claim. They focus instead primarily on the specific risks of prejudice posed to Eastern by the disclosure of its insurance coverage and to Aetna by evidence of Eastern's possibly gross culpability, and on the absence of any risk of inconsistent adjudications because of the asserted absence of any substantial common issues between the Aetna contribution action on the one hand and the passenger actions with their related third party contribution claims on the other.

Without here exploring the parties' opposing contentions on this point in the same detail that they have been advanced in both courts, it suffices to say that the district court did carefully assess them in detail in the process of making its determination

not to sever the actions. We are satisfied that the discretion exercised was in consequence a sound one.

Gauging the possible prejudice to Eastern flowing from the disclosure of insurance coverage, the district court made a pragmatic assessment, one frequently made by federal courts, *see, e.g., Tallant Transfer Co.* v. *Bingham*, 216 F.2d 245, 247 (4th Cir. 1954), that under the specific circumstances of this case, it would simply be unrealistic to assume either that the jury did not know that insurance coverage existed or that, if it were known to exist, it would likely inflate any damage award made against a corporate defendant such as Eastern. Since liability for compensatory damages was not in issue this was essentially the limit of risk. *Cf. Posttape Associates* v. *Eastman Kodak Co.*, 537 F.2d 751, 758 (3d Cir. 1976) (risk of imposing liability because of insurance coverage).

Assessing the possible prejudice to Aetna in its effort to obtain contribution from the government that would be created by revelation of Eastern's gross culpability and the details of the injuries suffered by the crash victims, the court recognized the risk and explicitly relied upon its ability to safeguard Aetna's interest by appropriate cautionary instructions. We agree that this is the sort of risk that a trial court may properly consider to be controllable by this means, and we are satisfied that the judgment that here it might be controlled was, in the event, borne out.[7]

Addressing the contention that there were no sufficient common issues between Aetna's contribution action and the main and third party contribution claims to warrant consolidation

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[7]the court gave careful cautionary instructions to the jury in advance of the presentation of evidence designed to clarify the relationships between the different parties and the different claims and to emphasize the necessity that matters relevant to one claim but not to another be kept in mind. The instruction was exemplary in its clarity and accuracy.

under Rule 42, the court correctly rejected it. Properly identified as substantial common issues were those of proximate causation necessarily involved in the passenger claims that Eastern's negligence proximately caused the crash, and Eastern's and Aetna's claims that the air traffic controllers' negligence concurred in causing it.[8] *See, e.g., A/S Ludwig Mowinckles Rederi* v. *Tidewater Construction Corp.*, 559 F.2d 928 (4th Cir. 1977).

We are satisfied that at the time the district court made its ruling against severance, it did so reasonably and on the basis of a sound assessment of the proper factors, hence well within the bounds of the discretion committed to it.

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[8]In the event, the commonality of these issues was made plain by trial developments. Indicative is the trial judge's assessment of the evidence as it bore upon the contribution claims directly against the United States which he decided non-jury. The same evidence of course bore upon the asserted individual liability of the air traffic controllers as alleged joint tortfeasors with Eastern, an issue submitted to and decided by the jury.

After recognizing that "pilots and air traffic controllers both have a duty to exercise due care to avoid accidents . . ." and that "[t]he fact that the pilots . . . were guilty of negligence, proximately causing an accident, [does not] preclude a finding that negligence on the part of the controllers was also a proximate cause," the judge concluded that on the evidence adduced air traffic controller negligence had not been established as a concurring proximate cause. "An accident of this sort could only occur through pilot inattentiveness and carelessness of a truly extraordinary nature. Failure of [the] controllers to observe the altitude of the plane . . ., if a cause at all, was a remote rather than a proximate or provoking cause."

"Moreover, the court is not persuaded, as apparently neither was the jury, that a warning from the tower, if it had been received, would have prevented the accident. The crew were not simply inadvertent but rather were grossly negligent. They distracted themselves with extraneous matters; they did not look out the window to see what numerous others saw—that they were dangerously low; they failed to comply fully with procedures instituted to keep flight crews awake and conscious of their altitude while descending and landing; they ignored the visual readings of five pairs of altimeters and beacons showing that they were too low and descending too fast, and they also ignored a shrill whistle and red light which called their low altitude emphatically to their attention. I am unable to find that an additional request from an air traffic controller that the pilot check his altitude would have changed the outcome."

Eastern's major contention on appeal—another of those in which Aetna joins—relates to conduct of opposing counsel in making improper comments and arguments to the jury. So gross was this conduct, and so manifestly did it taint the jury verdicts, say the appellants, that only by setting the verdicts aside could the prejudice be cured. The district court failed, they say, properly to curb and contain its effects as it occurred and committed reversible error in declining on their post-trial motions to correct it by that ultimate means. Though the contention is a serious one that has been treated accordingly, we conclude that here too the district court properly acted within its discretion in declining on this ground to reject these verdicts.

Of the many details of trial management necessarily committed to broad trial court discretion, perhaps none is more due appellate deference than conduct of non-judicial participants in the process that is asserted unfairly to have prejudiced the jury. *See Arkwright Mutual Insurance Co.* v. *Philadelphia Electric Co.*, 427 F.2d 1273, 1277 (3d Cir. 1970); *see generally* F. James and G. Hazard, *Civil Procedure* §7.18 (2d ed., 1977). This is a matter preeminently for on-the-scene sensing by trial judges. At that vantage point demeanor—here that of the jury—can be observed; the impact of efforts to control and dissipate prejudicial effects can be assessed in light of the interpersonal relationship that inevitably develops between trial judge and jury; and the actual effect of the conduct upon jurors—an effect frequently at odds with or actually counter-productive to that improperly intended by the offender—can be gauged first-hand. For the very reason that the problem is essentially one of assessing the immediate emotional and psychological effect of specific actions and words on particular people, the appellate vantage point in retrospective review on a cold written record is especially subject to misperceptions of what actually transpired and, more subtly, to miscalculations of likely effects. It is for this reason

that trial court discretion as to these matters is broad or—what comes to the same thing—appellate review is especially deferential.

It is important also to emphasize that review here is ultimately focused not upon the impropriety of counsel's conduct but upon the propriety of the trial court's response to it.[9] Of course if the conduct challenged is not by applicable standards improper in the first place, then there can be no abuse of judicial discretion in failing to take any, or particular, action to correct it. But the mere fact that conduct is improper—even grossly improper—does not end the inquiry. The question remains whether the judicial response—or lack of response—to the legally improper conduct constituted a prejudicial abuse of discretion. In consequence, a conclusion that no prejudicial abuse of discretion has been shown is not necessarily a condonation of the challenged conduct, though this is likely always to be—as it is here—the dire assertion of appellants.

Orderly review will therefore look first to the question whether and in what respects challenged conduct was in legal contemplation improper, then turn, if need be, to the more difficult question of the adequacy of the judicial response. We proceed on that basis.

There is no doubt that tested as and when it occurred by applicable legal standards much of the conduct specifically challenged was improper. Indeed the legal impropriety of some of it has been conceded both below and here by offending counsel. Beyond its legal impropriety, it was in substantial part inelegant, tasteless, offensive, arguably violative of professional standards and, perhaps most deserving of condemnation, irresponsibly

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[9]The specific response under review is of course the ultimate one: the directly challenged refusal to set aside the verdict. Earlier, pre-verdict responses (or nonresponses) are reviewed incidentally, as elements in the totality of the circumstances bearing upon the exercise of discretion in letting the verdict stand. *See* F. James & G. Hazard, *supra*.

threatening to any verdicts that might in the end be obtained by offending counsel's clients.

Since in the end we find no abuse of discretion in the trial judge's overall response to it, we might simply let stand this general assessment and disapproval of counsel's conduct. Fair review—to both sides—requires, however, that the general assessment be made more specific. Only so can offending counsel be protected against implication or speculation that things may have been even worse than they were in fact, and appellants be provided an adequately reasoned statement of our basis for decision. Additionally, the adequacy of judicial response can only be fairly gauged in reference to specific conduct.

Without attempting full embellishment of some of its more colorful elements, we first identify the specifically challenged conduct. In identifying it in mass and without full contextual detail it is important to keep in mind that of course it did not all occur in such possibly jolting proximity but in pieces over a period of days, and that its real flavor could only be appreciated in full trial context. Here we merely identify it to point up the various respects in which, under applicable standards, it was or was not legally improper to the point that judicial response of some kind was appropriate. For sake of analysis, we group the principally challenged comments and arguments in general categories.

In his opening statement to the jury one of the plaintiffs' counsel urged the jury to use the Golden Rule approach in fixing damages. After advising the jury that they would hear evidence of psychic injuries sustained by the plaintiffs and admonishing that "we do not present this evidence to you by way of asking for your sympathy," he added, "[w]hat we do ask you to do is to listen to it carefully, place yourself, if you can, in their shoes."

During jury selection government counsel, representing the contribution-claim defendants, called attention to the fact that the defendant air traffic controllers had children, one of whom had recently died. In opening statement the same counsel suggested that the only reason for the contribution claims was to mislead the jury as to the real issues.

In closing arguments to the jury different ones of plaintiffs' counsel and government counsel from time to time:

—made an outright appeal for sympathy: "I'm asking, I'm begging for your sympathy for this man. . . . They [plaintiffs] are begging for your sympathy";

—made disparaging remarks about defense witnesses: of one witness, that Eastern "must have searched the countryside" for him; and, of his testimony, that "for 40 bucks an hour, you can probably get almost anybody to say anything"; of another witness, Frank Borman, President of Eastern, that he was "pompous," "god-like" and that he, with others in Eastern's management, were now "condoning the very thing that killed 72 people";

—made disparaging personal references to defense counsel: "the gang over here"; "the best Eastern's money can buy"; that one was "ashamed" of his case and that plaintiffs' counsel was "sorry for [him] and that kind of attitude";

—made improper and intentionally inflammatory comments about Eastern's wealth, position and general culpability: "murderers' row"; the "great white knight corporation"; a "little poor airline" which "offered to buy [another line] for 342 million dollars"; that it had been engaged in "whacking them into the trees in Houston . . . running off the runway in Buffalo . . ."; had "killed 112 human beings in New York"; that "killing people and maiming people is something they've gotten immune to as a part of doing business";

—offered personal opinion as to the injustice and lack of merit of Eastern's defenses and Eastern's and Aetna's contribution claims: "outrageous"; "insulting"; attempt to "pass the buck";

"Eastern's bad joke"; "makes me sick"; makes me "angry"; "haven't really taken on that human responsibility to say we're sorry"; "lack of accountability"; and offered contrasting personal opinions as to the justice and merit of plaintiffs' tactical decisions not to sue the United States and the air traffic controllers: "the reason . . . is a simple one, [t]hey aren't liable, and we have a duty . . . not to sue people or the government when there isn't any liability";

—made improper references to settlements and settlement offers: "no offer to settle Mrs. Weston's case as long as I have been the attorney for the case"; defense counsel represents "the 19 insurance companies that have been busy buying off the claims of the other people, and he's finally run up against three human beings . . . and three lawyers that ain't going to be bought."

For purposes of this appeal we can accept that most of these statements and arguments (and there were others of comparable quality) were legally improper—in the sense that at the least and as to most some kind of censure or curative instructions by the trial judge—either *sua sponte* or on motion—would have been appropriate. Some obviously fell more clearly beyond the bounds of permissible advocacy than others. Some arguably lay at least marginally within legal bounds if not within those of the common civility that countless good lawyers have demonstrated is compatible with effective advocacy.

The Golden Rule appeal in opening statement and the blatant, direct appeal for sympathy in closing argument were plainly improper, and offending counsel concede this. The tasteless and irrelevant comments and allusions to and about opposing counsel were improper under applicable professional standards and justified censure if for no other reason than to preserve some degree of respect among the attending public for the profession and the process. Less clearly improper in the legal sense—though arguably so close to the line that some cautionary instruction

would not have intruded unfairly into the prerogatives of advocacy—were the heavy-handed personal characterizations of witnesses, the equally heavy-handed expressions about the *bona fides* of the defendants' tactical decisions in defending the actions, and some of the more pejorative comments about the degree of Eastern's culpability in relation to other air crashes. Of the same general stripe were the references to the defendants' refusal to make settlement offers to the plaintiffs, though in fuller context, as will appear, the technical impropriety of those comments may not have been that certain.

This leads then to the critical inquiry whether, on total balance, the trial judge's response to these several incidents of clear or arguable misconduct, leading finally to his refusal to set aside the verdicts, constituted a prejudicial abuse of discretion. As to this no more precise legal principles than those implicit in the general concepts of "abuse" and "prejudice" exist. In consequence, there is not much of specific precedential value to be found in other cases—as the parties readily demonstrate on this appeal by their equal ability to cite apparently conflicting decisions on the significance in different contexts of various examples of counsel comments closely comparable to those here in issue. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil*, §2809 & nn.2-6 (1973). In the final analysis the question is simply one of judgment to be exercised in review with great deference for the superior vantage point of the trial judge and with a close eye to the particular context of the trial under review rather than to any general formulations of principle or to assessments of comparable comments in other cases.

Helpful in focusing this general inquiry upon the specific ruling challenged—the refusal to set aside the verdict because of counsel's misconduct—is the Sixth Circuit's recent prescription for practical and principled review of such rulings in *City of Cleveland* v. *Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980). Fair review, said that court, must take into account the

"totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself." *Id.* at 756.

This is a helpful guide to proper and consistent review. It focuses in a practical and systematic way upon whether, all things considered, the virulence of the comments, their intrinsic capacity unfairly to prejudice the jury on the real issues, the inadequacy of any judicial efforts made to contain them or of any extrinsic factors of time or context to dissipate their force, make it a "reasonable probability," *id.*, that they improperly influenced the jury in reaching its verdict. "Improper influence" here must be understood to mean effective subversion of the jury's reason or of its commitment to decide the issues on the evidence received and the law as given it by the trial court. Only if such a reasonable probability is found can an abuse of discretion in declining to set aside that verdict be found. Our review on that basis discloses no such abuse.

Perhaps the single most important of the relevant circumstances here is the nature of the "real" issues before the jury. It is only with respect to these that the probability of improper influence can properly be gauged. They determine not only the content range of proper comment and argument but, to a considerable extent, the degree to which improper influence as opposed to the normal influence of partisan advocacy can be reckoned as probabilities in explaining the verdicts.

The dominant issue in this trial was the degree of Eastern's conceded culpability. This bore directly upon that defendant's liability for punitive damages. It bore less directly, but nevertheless legitimately, upon the claim of Aetna to recover contribution from the air traffic controllers as alleged joint tortfeasors, since it was inextricably bound up in the primary issue

of proximate causation central to that claim. It also of course bore directly upon the amount of punitive damages that might be recovered against Eastern. The other issues in the case were the amounts of compensatory damages due the three plaintiffs, liability for some amounts having been conceded.

The permissible range and content of inevitably damaging evidence and argument opened by these issues was wide and of an inescapably volatile nature. On the culpability issue, the substantive law not only permitted but required evidence—hence partisan argument—going to establish negligent conduct that a jury could find gross, wanton, and consciously indifferent to others' rights. *See, e.g., Robinson* v. *Duszynski*, 36 N.C. App. 103, 243 S.E.2d 148 (1978). On the compensatory damages issue, the nature of the injuries suffered by the miraculously surviving, completely faultless personal injury plaintiffs—hence of the evidence to establish its severity and lasting effect—was necessarily calculated to excite in any jury some degree of human sympathy, with or without overt appeals for it by counsel. *See Herman* v. *Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1275 (D.V.I. 1974), *aff'd*, 524 F.2d 767 (3d Cir. 1975).

When such issues legitimately dominate the trial of a case, a trial judge may well have a heightened obligation to police counsel against excesses of zeal and deliberate impropriety. By the same token, the obligation must be recognized as an exceedingly difficult one to discharge in fairness to both sides. In such cases the substantive law itself invites, indeed compels, inquiry into emotion-laden areas, hence evidence and argument that necessarily track the substantive law's content. In consequence, a trial judge attempting to contain excessive emotional appeals by counsel must be concerned as well to avoid unfair intrusions into the prerogatives of advocacy in developing the issues legitimately in dispute. Punitive damage issues—whether gross culpability exists, the amount required to deter and punish—are of course prime examples.[10]

Not only does the dominance of such issues justify cautious policing of emotional sallies during trial. More importantly for our purposes, it counsels great caution by reviewing courts in finding improper influence as the probable reason for a verdict disfavoring a party against whom the influence of peculiarly damaging but wholly proper evidence already inevitably runs so strongly.

When the specifically challenged arguments here are related to the real issues and to the verdicts returned upon them, perspective is properly gained. Without condoning them, we can lay aside as offensive irrelevancies—sufficiently dissipated in any event by general cautionary instructions of the trial judge[11]—the snide allusions to and characterization of opposing counsel,

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[10]In this they share to some extent with libel cases the characteristic that caused Judge Spears to opine in *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702, 714 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967), that "the very nature of the case made it virtually impossible to discuss the evidence free of emotion or drama," and Judge Wyzanski, writing more generally, to say of a political libel suit that "it is the modern substitute for ordeal by battle" in which "the prudent and second-thinking judge will stand severely aside, acting merely as a referee applying the Marquis of Queensbury rules." Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1283-84 (1953).

[11]*E.g.*, in closing instructions: "Your verdict is not to be based upon prejudice or sympathy or any bias you may have for or against flyers or people who get hurt. It's not to be based on emotion or on any outside information you may have about the case. . . . You are not to decide any fact on speculation or guesswork or conjecture. You're not to decide on any basis of a guess as to what you think the Court would do if the Court were the jury. . . . You are the jury, and you're to pay no more attention to what you think the Court would like for you to do than you are to what lawyer I last cussed out or who I fussed at the longest. The controversy is not between the lawyers and not between lawyer and lawyer, although they are the ones who generate the evidence and the biggest commotion. The question is one of law and justice among the litigants."

During trial: "[W]hen lawyers have been sitting for hours under tension they sometimes explode, so do judges, and I again instruct you that

(Footnote continued on following page)

of that counsel's conduct of the litigation, and of opposing witnesses. The theoretical possibility that either alone or in cumulative effect these may have exerted some generally improper influence on the jury's deliberations cannot be gainsaid. To find this a reasonable probability, however, would denigrate a jury whose obvious care in deliberating on this case over a period of some seventeen hours strongly belies even the possibility that its reason and its will to obey its mandate could have been subverted by such uninspired flights of invective.

The pejorative characterizations of Eastern's culpability, wealth, and callousness related essentially to the punitive damage issue. While gross and unimaginative in tone and phrasing, the substance of these arguments and comments lay at least arguably within the range of fair comment on evidence properly introduced on this issue. More importantly, their intended influence—whether proper or improper—was not realized on this issue since the jury found in Eastern's favor on it. That the arguments may indirectly and improperly have influenced the compensatory damage verdicts is a possibility recognized by the district judge that is better assessed in connection with our consideration of the size of the damage verdicts as itself suggestive of improper influence.

This leaves the Golden Rule suggestion in opening statement and the direct appeal for sympathy and the settlement comments

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(Footnote continued from previous page)

you are not to decide the case based on anything that takes place among the lawyers or between the Court and lawyers. . . . A little bit of temper flaring is natural, sometimes a little distraction takes place, but it usually livens up the proceedings, so long as there is not too much of it."

Whether these cautionary references to the lawyers' behavior and the court's response to it actually had the intended effect is of course beyond any reviewing court's power to gauge. What can be said is that in content it was directly on the mark, and that in the very homeliness of its style it was calculated to put the matter in proper perspective as peripheral flares of temper, "commotion," and "fussing" irrelevant to the jury's fact-finding obligation.

in closing argument. We look first to the comment that no settlement had been offered.

Aside from the possibility that this comment by counsel for plaintiffs may have been invited,[12] we think the trial judge adequately corrected and dissipated any improper influence stemming from it. Immediately after the comment was made, the judge, on objection of opposing counsel, severely admonished offending counsel in the presence of the jury and gave a firm and clear cautionary instruction.[13]

The Golden Rule and sympathy appeals are the most obviously improper arguments from a technical standpoint. Having no legal relevance to any of the real issues, they were *per se* objectionable in this case as they are in any. *See, e.g., Leathers* v. *General Motors Corp.*, 546 F.2d 1083, 1086 (4th Cir. 1976). Because here they had the potential, and were undoubtedly intended, improperly to influence the jury on the compensatory damage issue, their possible impact on that issue deserved careful attention. The following circumstances suggest that, as the district court concluded, actual prejudice from them was in the event unlikely. In the first place, no contemporaneous objection to either was

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[12]In his opening statements to the jury, counsel for Aetna, over plaintiffs' objection, told the jury that the insurers had "settled some 70-odd cases and paid out $21,788,957.72." The trial judge speculated in determining how to handle the later challenged comment by plaintiffs' counsel that the first reference may have been an improper attempt to establish in the jury's mind a comparable range of recovery, and that the later comment was an ill-advised, tactically unsound effort to counter that. *See Hall* v. *Texas & New Orleans Ry.*, 307 F.2d 875, 879 (5th Cir. 1962) (retaliatory argument judged differently).

[13]To counsel: "You may stay off of subjects which are forbidden for counsel to argue to juries whether they are true or false. . . . You better obey. The next time there won't be just a reprimand."

To the jury: "[s]ettlement of a suit or a claim is not admission of anything unless it contains . . . a formal admission of facts or formal admission of liability. The fact that a party does or does not offer to settle a case is not something for you to consider, has no bearing on the legal and factual questions which you may have to decide."

made by trial counsel.[14] While silence may sometimes reflect a prudent tactical assessment that objection will only magnify prejudice so that failure to object should not be held against the non-objector, *see Werner* v. *Upjohn Co.*, 628 F.2d 848, 854 (4th Cir. 1980); *Leathers* v. *General Motors Corp.*, 546 F.2d at 1086, it may also reflect a deliberate sandbagging tactic, *see Skogen* v. *Dow Chemical Co.*, 375 F.2d 692, 703 (8th Cir. 1967), or a tactically sound assessment by the person best able to judge the matter that though technically objectionable, the comment threatens no significant prejudice. Without speculating about possible sandbagging tactics, of which there is no intimation in the record, we are satisfied that the last possibility is the most realistic one here.[15]

The Golden Rule appeal was made in an opening statement several weeks before the case was submitted to the jury. It was, in fact, a rather cryptic interstitial comment which in context may well not even have conveyed to the jury the impermissible suggestion implied by the term. The issue of compensatory damages on which it bore was not a thin one that might actually have been tipped by the suggestion: liability was conceded, substantial damages in some amount were inevitable given the severity of the injuries concededly suffered. *Cf. Leathers* v. *General Motors Corp.*, 546 F.2d at 1086 (reversible error where liability issue "thin").

[14]Under the circumstances we are not disposed to seize upon this as a basis for declining review of the specific objections now raised. *See New York Central R.R.* v. *Johnson*, 279 U.S. 310, 318-19 (1928). Whether the failure to object may then, however, be taken into account in considering the objection on the merits is a different matter.

[15]Eastern's trial counsel—not the same as appellate counsel—were not generally asleep at the switch nor following a general policy of not objecting in order to avoid magnification of prejudice. On at least three occasions they did object to other arguments and comments by plaintiffs' counsel. None of these, however, is specifically brought forward by Eastern's appellate counsel as examples of improper conduct. To the extent this represents disagreement between trial and appellate counsel as to the potential for prejudice in particular conduct, the former's assessment may well be assumed to be the better informed.

The outright appeal for sympathy occurred some three weeks later in closing argument by another counsel for plaintiffs. It was the only such appeal made in an argument lasting some forty minutes that was not otherwise objectionable. No comparable direct appeal for sympathy was made in either of the two other closing arguments by plaintiffs' counsel. This was not a drumfire effort. *See Moore* v. *Teflon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978). It was made in behalf of a terribly injured plaintiff whose condition as properly presented to the jury was so naturally provocative of sympathy that the lawyer's overt appeal is best seen in context as a foolish redundancy rather than an independent source of prejudice.

We turn now to the verdicts themselves as circumstances indicative of improper influence. Eastern's contention on this point is inextricably bound up with its related contention that the damage awards should have been set aside as *per se* excessive. While possibly susceptible to separate conceptual analysis, these contentions are so closely related that we treat them here together.

The personal injury damage awards were indeed substantial: $3,027,500 for Arnold's personal injuries; $1,137,500 for Mihalek's. The district judge carefully considered the contention that they were so substantial as to be excessive and manifestly the products of passion or prejudice, whether traceable specifically to counsel's misconduct or to unidentified causes. It lay within his sound discretion to set the verdicts aside if he conceived them to be excessive without regard to a specific reason, or if he thought them indicative, either alone or in combination with other circumstances, that counsel's misconduct had probably inflated them to the point of excess. It also lay within his sound discretion to determine that all things considered they were not excessive, hence to decline to set them aside. This of course he did. Our review of that determination—without regard to the alleged cause of excessiveness—is only to assess whether

on an independent review of the evidence, *see Grunenthal* v. *Long Island Rail Road*, 393 U.S. 156 (1968); *West* v. *Richmond, Fredericksburg & Potomac Railroad*, 528 F.2d 290, 292-93 (4th Cir. 1975), the awards were so "untoward, inordinate, unreasonable or outrageous," *Grunenthal*, 383 U.S. at 160, that we must set them aside in exercise of our review power. As Judge Sobeloff pointed out in defining our role in reviewing such rulings, we are confined to looking for something more than mere "excessiveness":

> We operate in a narrower area of discretion than district courts in the supervision of jury verdicts. It is not enough if our appraisal of a jury's calculation of damages does not run parallel to the trial judge's appraisal. In reviewing the justness of a verdict the broader scope of discretion is in the trial judge, and the Supreme Court has made it plain that the appellate court must stand aside. The Court has acknowledged the possibility of appellate intervention only in the most extreme circumstances, as where the verdict is not merely excessive but "monstrous," a term borrowed from the old English case, Beardmore v. Carrington, 2 Wilson 244 (1764). In very few cases, however, where such a possibility was discussed has this high hurdle been surmounted.

Simmons v. *Avisco, Local 713, Textile Workers Union*, 350 F.2d 1012, 1020 (4th Cir. 1965) (footnote omitted). Or, as Judge Medina put it for the Second Circuit:

> If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand.

Dagnello v. *Long Island Rail Road*, 289 F.2d 797, 806 (2d Cir. 1961) (footnote omitted), *quoted with approval*, *Grunenthal* v. *Long Island Rail Road*, 393 U.S. at 159.

In conducting this extremely limited review to determine whether a verdict is not merely excessive but outrageously or monstrously so, we have recognized that a verdict cannot be so characterized if there is in the record credible evidence which if accepted by the jury and given its most favorable inferences will support it. *See West* v. *Richmond, Fredericksburg & Potomac Railroad*, 528 F.2d at 292. Reviewing on this basis and under this standard we cannot hold these verdicts outrageous or monstrous in relation to the evidence of record.

In each of the personal injury cases, the major component in the damage award was pain and suffering, an item obviously not susceptible to fixing with mathematical precision but instead a matter of collective juror judgment based upon the relevant evidence and the commonly shared human experience. It is as to this component that the inquiry into excessiveness most directly relates.

Looking first to the Mihalek award of $1,137,500, a total of $7,934 in medical expenses was established without dispute. Though Eastern sought by careful cross-examination to discount the actual extent of Mihalek's pain and suffering and loss of past and future earnings, it offered no evidence directly refuting plaintiff's evidence. That evidence would have justified the jury in accepting the following view of the consequences of the accident as now contended in Mihalek's behalf.

On September 11, 1974, Mihalek, then a forty-five year old businessman, was a passenger in the first-class section of Flight 212. In the crash he was critically burned, lacerated and battered. His hands were so burned that the flesh was hanging by the knuckles. Burns extended over the entire top of his head, and portions of his forehead, cheek, ear and neck. There were burns

on his back, his right forearm and his elbow. The arm was broken, with the bone protruding at the elbow. Mihalek was hospitalized for five weeks. After he was released, he was required to make continuing periodic visits as an outpatient for physical therapy well into 1975. He has a permanent limitation of approximately 22% in the functions of his various limbs and digits.

The most devastating injuries to Mihalek as a result of the crash of 212, however, are emotional ones. Before the accident, he was a good father and family man, an industrious and aggressive business man who liked to tackle and solve problems, an outgoing, energetic individual who was considered by business associates to be extremely efficient and honest. Before the accident, he had worked his way up at AVCO-Lycoming from a machinist into the position of Director of Industrial Engineering. When that organization closed the facility at which he was employed, Mihalek began his own company. So successful was this venture that another company subsequently bought Mihalek out and transferred him to Charleston, where he was to supervise 40 people in the start-up of a new facility. Mihalek's energy, business acumen and supervisory ability during these years resulted in his annual income rising from $20,944 in 1970 to $143,988 the year preceding the crash.

After the accident, Mihalek suffered devastating emotional difficulties. He was unable to cope with seemingly minor situations, became very docile and tended to stay at home. He would burst into tears spontaneously at home, in public, and with friends. He felt detached, withdrawn, and unmotivated; suffered from loss of interest and loss of energy; and had difficulty in completing simple tasks. The most devastating effect on this once-vital man was that he had lost a sense of power and control over his own life. He had problems concentrating and he had a sense of unease, dread and anxiety. His income dropped severely and during the four years preceding the trial, he had no income at all.

According to an expert psychiatric witness who examined Mihalek, he suffered from a chronic post-traumatic stress disorder precipitated by the accident and is permanently psychologically impaired because of the accident. According to an expert economics witness, the present cash value of the actual economic loss to Mihalek because of the crash of 212 is $520,689 exclusive of such job-related benefits as life insurance, health insurance and a retirement pension plan.

Commenting on this evidence, the trial judge cogently observed that from it "the jury was entitled to conclude . . . that . . . Mihalek . . . has suffered a lifetime psychic disability, and that as a result . . . a once confident, ambitious, and highly competent business executive has been reduced to passivity, inactivity and despair . . .; starting from that premise, there is nothing excessive or shocking in the award of $1.1 million that, in addition to the other demonstrated elements of damage, compensates Mr. Mihalek for the lifetime loss of what he was as a person before the accident occurred." We would not be disposed to quarrel with that assessment were our standard the same as the trial judge's. Certainly, gauging it by the narrower standard of "outrageousness," we would not.

Turning to the Arnold award of $3,027,500, the undisputed evidence established medical expenses of $50,646 and lost wages of $13,386 as of trial time. As with the Mihalek evidence, Eastern sought to discount Arnold's evidence of pain and suffering and loss of future earnings only by cross-examination. From Arnold's evidence, the jury could have accepted the following view of the consequences of the crash to him in relation to these items of damage. At the time of the crash, Arnold, a passenger, was a thirty-one year old systems engineer employed by IBM. He was a college graduate who before joining IBM had been honarably discharged as a captain in the United States Air Force where he programmed computers. In the crash he suffered multiple lacerations and general trauma, but his principal injury was by burning. He was severely burned over extensive portions

of his body. Taken after emergency treatment in Charlotte to the Medical College of South Carolina in Charleston, he was hospitalized there in the Burn Unit of the hospital for two and a half months where he received extensive treatment of a painful and emotionally destructive nature.

A total of 33 debridements (the cutting away of dead skin in order to get to live skin) were performed. He underwent eight skin graft operations, many of which required that he be put upon a Stryker frame which suspended him upside down for days. After Mr. Arnold left the hospital, he continued outpatient therapy. He had to learn to walk again and suffered severe physical deformities. Additionally, after his initial stay in the hospital, Arnold underwent four operations in an attempt to restructure his hand.

The major permanent injuries sustained were to his hands. According to an orthopedic and hand surgery specialist, Arnold's right hand was 100% permanently disabled and his left hand has a 52% total permanent disability. The remainder of Arnold's body was horribly scarred from the burns and the frequent skin grafting attempts. The jury viewed the skin on Arnold's body, still terribly deformed after five years. According to an expert psychiatric witness, Arnold suffers from a chronic neurotic illness which he would continue to have unless he went into intensive psychotherapy, and in consequence looks upon himself as a defective individual.

In commenting upon Arnold's evidence of pain and suffering, the trial judge remarked that "though dramatic" it was "credible and without parallel in the experience of the trial judge" and stated that "in combination with the lifetime disfigurement and disability proved at trial and other proved damages, [it] renders the $3 million award neither excessive nor shocking."

Reading the cold record, we might be more adversely affected by the apparently contrived dramatization of some of Arnold's

testimony than was the trial judge in whom it only prompted a passing characterization. But this simply illustrates the reason why our discretion in review is wisely made narrower than his in assessing the probative force of this kind of evidence. We are not prepared to say that the size of this verdict does more than make the question of excessiveness with us a close one. As indicated, that is not enough to justify substituting our judgment for that of the trial judge. He had the supreme advantage of assessing not only Arnold's demeanor as a witness and his personal appearance but also of gauging the immediate reaction of the jury to his patent over-dramatization of events and conditions and his rather obvious efforts at ingratiation.

When all is discounted, there remains the fact that Arnold has sustained at age thirty-one injuries which, in addition to the immediate consequences of profound physical and emotional shock, intense post-crash suffering, and painful and demeaning medical treatment, have left him, after the best endeavors of medical science, a relatively young man permanently disabled in essential body functions, permanently scarred and disfigured in physical appearance, and permanently damaged emotionally and psychologically. Though he remains a functioning human being, he has been substantially shattered as the whole person he was before the crash, and will live out his days suffering the consequences. An award of $3 million to compensate him for these consequences in addition to his direct monetary losses and expenses is undoubtedly a generous one and one which might in the exercise of sound trial court discretion have been deemed excessive, but we cannot say of it that it is so monstrous or outrageous that we should intervene in the jury's fact-finding function to disturb it at the appellate level. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §2820 & nn.95, 97 (1973).

In sum, upon considering the totality of the circumstances bearing upon the matter, we cannot say that it is reasonably probable that counsel's misconduct—objectionable as it was in

many details—improperly inflated these damage awards. There are too many other and proper bases upon which their concededly generous amounts may be explained.[16] To indulge such an assumption would be to denigrate a jury which to all appearances of record was not in a "runaway" mood in which it would be likely prey to such influences. It would also be to assume that the various cautionary instructions of the trial judge, only some of which we have specifically noted,[17] were disregarded by the jury. We think that instead we must presume on this record both that the jury understood and was faithful to its general mandate and that it was responsive to the specific cautionary instructions. Neither are we prepared to say upon an independent review of the evidence, *see Grunenthal* v. *Long Island Rail Roard,* 393 U.S. at 159-60, that the amounts of these awards are so outrageous, or untoward, or monstrous that, irrespective of cause, they must be set aside in exercise of our narrowly constrained appellate review powers. *See Neese* v. *Southern Railway,* 350 U.S. 77 (1955).

For many of the same reasons, we much more readily conclude that counsel's misconduct cannot be declared a "reason-

[16]In this connection it is appropriate to note another improper basis which, if accepted, would have provided an independent discretionary ground for setting aside the verdict. This is the possibility that the verdicts represented an improper jury "compromise" of the punitive liability and compensatory damage issues. The trial judge in fact recognized this as a possibility, but in the end of course did not seize upon it as an alternative independent ground for setting the verdicts aside. On this appeal counsel for appellants belatedly seek by this "compromise" theory to trace the prejudice from counsel's misconduct away from the punitive damage issue—on which they won—into the compensatory damage awards. In this they meet themselves coming back. In the trial court they contended—opposing the possibility of a new trial on both issues and arguing instead for new trial on the compensatory damage issue alone—that the jury had not so entwined the issues in its verdict that it was wholly tainted. While the well established procedural bar to such changes of position is not an absolute one and should yield in appropriate circumstances, we see no reason to depart from it here. There was no adversary presentation of this possibility in the district court.

[17]*See* notes 7, 11, 13 *supra.*

ably probable" explanation of the jury's verdict against Aetna on its contribution claim. Laying aside all the other factors, the critical circumstance here is that, to us, the issue of concurring negligence—of proximate causation—on which this claim turned, simply cannot be assessed as one so "close" that we would be justified in attributing the verdict upon it to any such improper influence. While the issue going in was obviously an honestly disputable one, the evidence adduced readily explains the jury's determination that if there was any negligence on the part of the air traffic controllers it was, in the district court's stated analysis, a "remote rather than a proximate cause."[18] We are not prepared to reject that ready and proper explanation in favor of the improper one for which Aetna contends. Obviously we find no abuse of discretion in the district court's refusal to set aside this verdict on this ground.

III

Eastern and Aetna have either jointly or independently assigned other errors which we have considered, found not to require reversal, and merely identify here without extended discussion.

Eastern complains of the admission of evidence concerning crashes that occurred after the one here in issue. We agree with appellees that in the peculiar context of this trial and particularly in view of Eastern's attempt in earlier testimony to establish an improving safety record at the critical time, the district court did not abuse its discretion in admitting this evidence as relevant, both for direct and rebutting purposes, to essential elements of the punitive damages claim. On Eastern's and Aetna's challenge to the district court's findings and conclusions exonerating the United States from liability for contribution, we find no clear errors of factual finding nor errors of law justifying reversal. Indeed we find the findings and conclusions unassail-

[18]Made in deciding the contribution claim against the United States non-jury. *See* note 8 *supra.*

able on the evidence adduced. Aetna has complained of the court's instructions to the jury on the contribution issue, but after a review of those instructions in total compass we find no prejudicial error. We think that the instructions properly explained the relevant principles of concurring negligence and proximate causation that controlled resolution of the contribution issue. Finally, we see no error in the district court's refusal to admit Aetna's proffer of certain evidence related to improper training and supervision of the air traffic controllers. Other evidence on the issue was admitted, and the district court's exercise of its discretion in refusing the additional proffers was not improper.

IV

On Eastern's challenge to the district court's action in allowing the Weston wrongful death plaintiff to accept a remittitur of $50,000 and entering judgment on the reduced verdict we find error which, regrettably, requires reversal and remand.

Before the jury retired, counsel for Eastern duly objected to the submission to the jury of pain and suffering as a compensable item of damages on the wrongful death claim. The basis of this objection was that there was insufficient evidence that Weston had survived the crash even momentarily to permit an inference that he consciously experienced any pain. The district judge permitted the jury to consider the question, but in his written ruling upon Eastern's post-verdict motions to set aside the verdict, he stated that upon reflection he was persuaded that he had committed "technical error" in submitting this as a recoverable item of damages. On that basis he ordered a new trial on damages alone conditioned upon plaintiff's refusal to accept a remittitur of $50,000. When plaintiff accepted the remittitur in this amount, the court entered judgment in the reduced amount of $797,000. We express no opinion as to whether this issue properly should have been presented to the jury, but we nevertheless hold that the use of the remittitur device here was improper.

Having accepted the remittitur, the plaintiff did not, as she could not, *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648 (1977), appeal from the resulting judgment. In consequence, on Eastern's appeal the only issue presented for review is the propriety of the district court's action in allowing the remittitur as a means of correcting its perceived error. The precedent ruling, that trial court error made the verdict unsupportable in the amount awarded, is not properly before us for review. Only the plaintiff, as the party aggrieved by it, could challenge it on appeal. Though as appellee she has sought to do so, contending that pain and suffering was properly submitted, she is limited as appellee to defending, on any grounds available on the record, the judgment as entered and may not seek to enlarge her rights under it, as would a successful attack upon the ruling. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924).[19] Our review is therefore limited to the issue raised by Eastern's appeal on this point: whether the corrective action thereafter taken by the trial court was proper. We hold that it was not.

Remittitur may properly be used to remedy an excessive award of damages made by a properly instructed jury if the award is

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[19]We note that in *Durant* v. *Surety Homes Corp.*, 582 F.2d 1081, 1085 (7th Cir. 1978), the court held that a plaintiff in a comparable situation was entitled as appellee to challenge such a precedent ruling "[f]or the limited purpose of defending the remitted judgment." While this approach may have first blush attractiveness, in view of the now-settled federal rule that a plaintiff who accepts a remittitur may not appeal from the remitted judgment, *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648 (1977), we respectfully disagree with it. The rule that prohibits an appellee from attempting to enlarge rights under a judgment is a long-standing and salutary one that serves important ongoing procedural values. We fail to see how allowing an attack on the precedent ruling here has the "limited purpose" of—or is indeed at all necessary to—merely defending the remitted judgment. To allow it is to permit direct circumvention, in any case where the defendant appeals a remitted judgment, of the *Donovan* prohibition against remitting—plaintiff appellate challenges. Perhaps significantly, the *Durant* court, reviewing the precedent ruling at appellee's behest, found no error in it.

not attributable to passion or prejudice. *See generally* 6A *Moore's Federal Practice* ¶59.05(3). But we agree with those courts that have held that it may not properly be used over a defendant's objection to remedy a trial judge's error unless the amount of the award traceable to that error can be at least closely approximated or capped by a maximum figure through resort to the trial record. *See Durant* v. *Surety Homes Corp.*, 582 F.2d 1081, 1085-86 (7th Cir. 1978); *Jacoby* v. *Johnson*, 120 F. 487, 488-89 (3d Cir. 1903); *see also New York, C. & St. L. R. Co.* v. *Niebel*, 214 F. 952, 957-58 (6th Cir. 1914) (appellate court similarly limited). Where, as in this case, a jury's undifferentiated lump sum damage award[20] is made up of a number of properly compensable items and one noncompensable item, use of remittitur involves judicial correction of a jury's verdict by a process of determining "an unknown fraction of an unknown portion of an unknown whole," *Niebel*, 214 F. at 958. This goes beyond the traditional bounds of the device for correcting jury excess and impermissibly impinges upon the right of the defendant "to have the damages assessed by a jury under proper instructions by the court." *Jacoby* v. *Johnson*, 120 F. at 488. To correct this error there was, in unfortunate consequence, but one recourse for the trial court and even more unfortunately there is now

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[20]It is this aspect that distinguishes the instant case from those cited by plaintiff as support for the court's use of remittitur here. In both *Bonn* v. *Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975), and *Jones* v. *Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976), remittiturs were upheld in wrongful death actions on the basis that the awards were excessive in their pain and suffering components. In neither, however, had the court erred in submitting this as a compensable item and in both the juries returned special verdicts which broke out the exact amounts awarded for this item. In these cases therefore the maximum amounts attributable to the challenged components were known and the remittitur was simply to reflect a jury excess as to those separable components.

for us but the same recourse[21]—to require a new trial on the damage issue as the defendant's due. *Id.*[22]

The judgment is affirmed in all respects save that respecting the Weston wrongful death claim. As to that claim the judgment is reversed and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART;
REVERSED AND
REMANDED IN PART.

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[21]We cannot find the error harmless, as the plaintiff suggests we might, on the basis that the remitted award lies clearly within a permissible total range of properly compensable items. The very problem which makes remittitur improper here is that neither we nor the trial court has any possible way of knowing what amounts may have been assigned by the jury to the various items. For all we can tell the amount assigned the uncompensable item may have bitten into the outer limit of amounts properly, but not necessarily, assigned to compensable items. Under the state wrongful death statute, N.C. Gen. Stat. §28A-18-2(b)(4) (1981 Supp.), and the court's instructions, several of these are unliquidated.

[22]The sole issue before the district court upon remand is that of compensatory damages. The district court's suggestion that if a new trial were ordered on appeal it would be conducted as to both punitive damage liability and compensatory damages is of no force. The district court denied plaintiffs' motion for a new trial on the punitive damages liability issue, and plaintiffs did not appeal from that order. This ruling, unappealed, was not in consequence subject to defense by Eastern on appeal and Eastern is entitled to have it treated as the law of the case. *See* F. James & G. Hazard, *Civil Procedure* §11.5 (2d ed. 1977).

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

The overburden on our federal judicial system is no little matter. Judge McMillan faced an aggravated strain on the orderly functioning of his court as an aftermath of a tragic airplane crash. Eastern Airlines flight 212 on September 11, 1974 plummeted to earth near Charlotte, North Carolina, killing 69 passengers and 2 crew members. Nine passengers and 2 crew members survived.

The following lawsuits piled up in the United States District Court for the Western District of North Carolina, threatening a massive legal traffic jam:

1. The action of Richard Arnold IV for personal injuries;

2. The action of Francis C. Mihalek for personal injuries;

3. The action of Helen Rae Weston, as executrix, for the wrongful death of her husband, Lewis D. Weston;

4. The action by The Aetna Casualty Company and other insurers of Eastern Airlines under the Federal Tort Claims Act, 28 U.S.C. §2674, against the United States, and under North Carolina common law against four air traffic controllers, claiming negligence which assertedly caused the crash.

The claims of the insurers sought indemnification or contribution for settlements made with more than 70 other victims of the crash or their next of kin.

In the Arnold and Mihalek cases, Eastern Airlines impleaded the United States, claiming that the air traffic controllers had negligently contributed to the accident. Eastern acknowledged its own liability for compensatory damages in all three accident cases but denied liability for punitive damages and put the three plaintiffs to their proof as to the amounts of compensatory damages.

Obviously, if each of the actions were separately tried, it would take months to dispose of all the litigation generated by a single incident. Some cooperation designed to relieve the situation took place. The parties did not contest the consolidation for trial of the Arnold, Mihalek and Weston cases.

Judge McMillan decided, however, that things must go further in that direction. He, *sua sponte*, but over the objection of Eastern Airlines and of the insurance companies, ordered *all* the cases consolidated.

To try all the cases together admittedly presented problems of some substance. First the consolidation of the three accident cases with the claims of Aetna and the other Eastern insurers seeking indemnification or contribution necessarily meant a disclosure to the jury that Eastern Airlines was insured, and that insurance carriers, rather than Eastern Airlines itself, would bear all or a substantial portion of any award to Arnold, Mihalek or Weston. It is, of course, well established that such information should, to the greatest extent possible, be concealed from the jury. *E.g., City of Cleveland* v. *Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980); *Langley* v. *Turner's Express, Inc.*, 375 F.2d 296 (4th Cir. 1967); *Fincher* v. *Rhyne*, 266 N.C. 64, 145 S.E.2d 316 (1965). *See* Fed. R. Evid. 411. ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully").

Second, the insurance companies, to quantify their claims, would have to bring out just what they had paid in settlement to crash victims or their next of kin. Those awards totaled almost $22 million—an *average* recovery of over $314,000—and could well influence the jury to apply some kind of victim fungibility rule ("If the loss of Jones injured his family to the extent of $314,000 certainly Smith's—or Weston's—family should be treated no less handsomely"). Of course, the peculiar and varying facts of each case should be determinative, with no attention paid to what some other unfortunate victim got.

I am ready to assume, for the purposes of this case that, despite difficulties which customarily would dictate separate trials, consolidation of all the cases was, nevertheless at least theoretically proper, in view of the great dislocations that otherwise were in store for the Western District of North Carolina. Fed. R. Civ. P. 42(a). But, by the same token, the very elimination of customary safeguards, regarded as necessary to insure fairness in the courts, imposed a heightened need to insist on scrupulous fairness in all other aspects of the trial of the consolidated cases. Otherwise the Fed. R. Civ. P. 42(b) mandate to the district court that it conduct, if necessary, separate trials to avoid prejudice would be consigned to the dead letter heap.

Eastern Airlines was the one from whom customary safeguards, for reasons of overriding exigencies, were withdrawn. It did not, as the cases proceeded through trial, receive scrupulously fair treatment. Quite to the contrary, it was subjected to abusive and overreaching behavior recognized by Judge McMillan himself as excessive–beyond the normal leeway allowed counsel under the excitement and tension of a hotly contested trial.[1]

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[1]Some examples of improprieties are set out here. Mr. Hemric, representing Richard Arnold, had this to say to the jury:

> I'm asking, I'm begging for your sympathy for this man and for all the passengers on that plane. . . . They [the plaintiffs] are begging for your pity.

Mr. Diehl, also counsel for Richard Arnold, asked the jury to put itself in plaintiff's shoes:

> Let's talk about compensation a minute. After much squabbling, we got in the photos of the airplane crash, the heat, the wreckage, the fire, the destruction, Richard Arnold what a guy just out of an airplane looks like burned, burned over 47 percent of his body, third degree, second degree, first degree. We've had a little sunburn. I'm light-skinned, I don't need to do anything but poke my head out and I get burned. Perhaps you've had similar experiences, and Solarcain takes the pain away. Put a little squirt on and you're okay. You imagine being fried in Eastern Airlines' kerosene and how that feels. . . . He fought and kicked and got out of the plane. What difference does it make how he got out? It's a miracle that he

(Footnote continued on following page)

> got out of the plane. They would rather him not have gotten out of the plane. It would be so much easier, but he got out of the plane, and he got out of the plane after being subjected to something that I can't conceive, watching other people waving their hands as they burned to death.

He later argued:

> I want to use the time I have left to, again, approach the theme of common sense and logic and tell you what I think is the most illogical thing of this trial. The most, the thing to me that makes the least common sense—and I have in my own mind dubbed it Eastern's bad joke—I refer you to the cop-out defense of Eastern Airlines, the attitude that by coming into this courtroom and saying, we admit negligence. We're sorry. We know our pilots crashed the plane. You caught us, caught us in a technicality. They misread an altimeter. We had two of our ace guys up there, ace pilots, and you caught us in this slight transgression and so, for that reason, give them some small amount of compensatory damages and, by the way, folks, there they are, the real culprits, murderers' row over there, the guys that did it. We're sorry, but what we really want to do is cop-out. We want to put the blame on somebody else. We want to sue the air traffic controllers individually for all the carnage and horror we caused. I think that defies logic and common sense. It made Scott Crossfield [witness for plaintiffs] sick. It makes me sick, and, members of the jury, I hope in the bottom of the pit of your stomach it makes you sick that these people would think that they can pull that in a court of law. It is outrageous. It is exemplified by what you saw. Frank McDermott, the man with the bionic ears, he hears things on cockpit voice recorder tapes that nobody else hears, and he comes here to tell you that he hears them to make you think that these pilots were busy flying the airplane, and he hears things on air traffic control tapes to make you think that these guys sat idly by and watched the bird crash and did nothing about it. It is to me the ultimate disgrace of failure to accept responsibility. It's the kind of logic that brought you Leo Marshall. Wonder how long they had to look for a Mr. Marshall? He said he was hired October 24th. That's over five years after this plane crash. They must have searched the countryside for somebody who had been in the air traffic control tower and who would come in and say, I read the reams of paper—it must be that high—and I find in those reams of paper a duty to watch airplanes all the way down, and I also find, based on what I've heard in this courtroom, that these guys breached that duty. Well, folks, for 40 bucks an hour, you can probably get almost anybody to say anything. I don't think there was a bit of merit in

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anything he said. It's irrelevant to my lawsuit, but it defies logic, and it tells you the attitude, the attitude, the attitude that's still here. I think their strategy backfired. I think it destroyed in your minds the credibility of the great white knight corporation, Eastern Airlines; and if McDermott and Marshall didn't destroy it, then the star witness of the trial, excuse me, I'm getting ready to say something bad about Frank Borman. Please forgive me. The star witness of the trial, Frank Borman, exemplified everything that I'm about in this case. From the moon ride to the TV ads and wherever you see him in the newspapers and magazines, he had the audacity and gall to walk into this courtroom and to tell you the cockpit conversation had absolutely nothing to do with the crash of the plane. We didn't call Frank Borman. . . . [T]hey needed the luminescence, the glow, John Golding's new-found hero to come here and impress you. . . . That pompous, he's been to the moon. Congratulations. I've been to Waxhaw, big deal. I'm not an astronaut. I'm not the President of Eastern Airlines, but his attitude made him the star witness of this case, folks. He is why they haven't learned a lesson, he and Captain Brady. . . . Their conduct, Daniels and Reeves, what they did in that airplane is in wanton and reckless disregard of the rights and safety of the passengers of the airplane. I would be astounded if you don't find that, and I think that's all you need to find; but Borman and Brady, if you want to go back to where that kind of logic comes from, that's where you go. You go right to the top of the airline. The buck stops there. Those guys in 1979 are condoning the very thing that killed 72 people five years ago. It's gross negligence of the pilots and it's gross negligence of this almighty corporation. It's double gross negligence. . . . Captain Brady, the seed, just like you said, Howard, here comes the oak tree. He told you I was going to say it. He planted the seed of a misread altimeter. Well, I don't think it was the seeds of a misread altimeter. I think what was going on there had been planted long ago. It was cockpit complacency. It was lack of discipline in the most gross, worst sort of way. It is exemplified in 1972 by flying into trees, taking off on the runway in Greensboro in the slush, hold onto your wing, honey, with the stewardess in the cockpit, killing people in the Everglades flying that plane into the ground, a year earlier in Charlotte whacking that 30-foot pole 3500 feet short of the runway, two special surveillances by the FAA, a road show. Did you see it? Where was the road show they bragged about? You didn't see it and Jim Daniels didn't see it, but they made money. They're making money. In 1973 they lost 36 million dollars. In 1974, the year they burned these folks, they made 5.6 million dollars. Need a figure for punitive damages? That is their profit that year, 1974. Did they learn a lesson? No,

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they're wacking them into the trees in Houston three months later, running off the runway in Buffalo three months later, and in June, 1975, they killed 112 human beings in New York. They learned a lesson. That's the year they lost 50 million dollars, but they are still here, folks. They bounced back from a setback of an economic nature. . . . Well, I say this to you, it was no seed of a misread altimeter. By the time these guys got around to crashing 212, maiming those people, killing those people, it was an oak tree of indifference, and you ought to cut it down. You ought to crash it to the earth the same way they crashed 212 and, if that appeals to your emotions I hope it does. It's time to stop it. They have not learned. They are here in '79 with the same defense they had five years ago, a misread altimeter. What other aspects of the great oak—McDermott, Leo Marshall—a theory that the air traffic controllers should have been watching and waiting. They should have known Reeves and Daniels were turned loose on the rest of society that morning. It's a mind-set that comes into this court and tells you that if other people crash airplanes it's okay for us to crash airplanes. Its got big, strong branches, this old oak that you need to take down, with witnesses in it like Sandy Sanderson, the pilot who flew the plane into the bay, National pilot. He flew the plane into the bay, and they brought him to say it's okay to fly the plane into the bay. Maybe that's why they wanted to acquire National Airlines, wanted to get Sandy on the payroll. Can you imagine getting in an airplane one morning, an Eastern jet, and they come on, welcome aboard Eastern Airlines, Captain Sanderson, Captain Daniels in the cockpit. Instead of passing out coffee, I assume they would roll down and hand out altimeters for the passengers. How sick would you be with that kind of logic? . . . If you want to give them a message you're going to have to hit them in the pocketbook in a way they understand. Killing people and maiming people is something they have gotten immune to as a part of doing business.

Mr. Pangia, representing the government, stated:

Then they have the nerve to come in here—look at the caliber of the evidence—they come in here and put another pilot on the stand that says, yes, I went with my bus, speeding down the road, driving recklessly, and I crashed and I killed a couple of people. It happens all the time. Like a bank robber taking the stand and bringing in another bank robber and saying we rob banks all the time, it's okay. I haven't robbed a bank for three weeks now, I don't think I should be punished. That's the testimony you heard here. And the tragedy of this case, the tragedy of this case, ladies and gentlemen, is not just what happened here. This is not some recalcitrant teenager or some hoodlum out in the street that says it's

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somebody else's fault, or a lot of hoodlums go out and rob people or a lot of people drive recklessly. This is an attitude endorsed by a major corporation of coming in here and trying to pull a cop-out. It's an attitude of a major corporation and when we tolerate that in this country, it's the beginning of the end.

You know what this case here is all about? This case is all about a bus driver, taking passengers on in the bus, driving down the street, speeding and driving recklessly, and having a crash and killing and maiming people, and then the bus driver goes to the police station and sues the policeman for not catching him on the radar trap. That's what this case is all about. Then yesterday I hear Mr. Barwick come up here and talk about fairness, oh, be fair to us, that you should be fair, we shouldn't be punished for our wrongdoings. 35 million, 960 thousand 8 hundred 68 dollars plus interest against each one of these individuals [the air traffic controllers], plus interest. They also sued for costs. They also want them to pay for costs of this whole shooting match. That's what they sued them for. Fairness they talk about. Don't hurt us, we're just a little poor airline, with leverage of two million dollars and, as the evidence showed, offered to buy National Airlines for 342 million dollars, and they say that is going broke. Treat us fairly, but sue them, get them for 35 million, nearly 36 million dollars each. I guess they figure they could borrow it.

And then they talk about the fairness, about the settlements that they have made, and that they are suing for their settlement in part they want from the air traffic controllers. They were dragged into a courtroom. The government was not involved in that case. Eastern was dragged into the courtroom and there was a case. They did not want to pay, those passengers had to sue them, and then they talk about fairness.

Now Mr. Barwick, when he came up here to argue, didn't mention that Eastern as well as its insurers is looking to pass the buck to these air traffic controllers. He didn't mention that. Maybe he's ashamed of it, and rightfully he should be because it's not fair to come up here and try to make you feel sorry for Eastern Airlines while doing what they're trying to do to these people for doing their job. Yes, I'm angry. And then they couldn't understand why the plaintiffs here, the people that were injured in this terrible accident, people that were hurt, lost loved ones in this terrible accident, why they have not sued the air traffic controllers. That was beyond their comprehension. Why, they haven't come up with some kind of a reason. Well, maybe they're honest.

Mr. Smiley, representing all three plaintiffs, argued:

We all heard those tapes long before the decision to file this law-

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If such abuses had taken place where each of the Arnold, Mihalek and Weston cases was separately tried, or where, while those three cases were consolidated the remaining cases were not,[2] the existence of insurance and the knowledge of recoveries by other victims would not have been thrown into the jury's pot. Probably then corrective action by the district judge with respect to abuses by counsel would have sufficed to insure the doing of justice. Whether instructions to disregard and scoldings of counsel are sufficient to counter the prejudice of improprieties by counsel is a matter which customarily falls within the scope of the trial judge's discretion.

But here all the flexibility for accommodating to and neutralizing such prejudice had been exhausted at the outset by the

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suit was made. The reason we did not sue the government is an extremely simple one. They aren't liable, and we have a duty to this Court and our clients not to undertake to sue people or the government when there isn't any liability. It's a duty imposed upon us as officers of the court, and we believe it, and that's why we didn't do it, and we wouldn't do it today.

And Mr. Pangia argued again:

> I pray that you view this evidence, understand it sufficiently to do the right thing here. Mr. Rutherford, or the gang over here has an hour and a half after me. I will not have a chance to come back and refute. Those are the rules which we have laid out. So this is the last time I have to talk to you, and I just pray that you end this three year nightmare for these gentlemen [the air traffic controllers]. Their reputation in the community, facing their families, you know what it's like to go home with a lawsuit like that to live with for three years. They have been literally held as hostages for three years. Try to go to a bank and make a loan, try to buy a car and have to explain. . . .
>
> COURT: I don't believe we heard any evidence about that.
>
> MR. PANGIA: End the nightmare, please.

[2]Consolidation for trial of the insurance company claims and the Eastern Airlines impleader would have been possible, without the threat, promptly followed by the actuality, of prejudice to one of the parties. That approach would have permitted the handling of all cases and claims in only two trials. The situation, it seems, developed into one where a good idea was pushed one step too far.

imposition on Eastern Airlines of the not insubstantial weight of disclosure of insurance and of the amounts paid to others. Indeed, the counsel committing the improprieties even seized on the opportunities to enmesh, and thereby enlarge, the two areas of probable prejudice. Among the blatantly improper brayings were the following statements by counsel representing all three plaintiffs:

> Finally, Richard Arnold. Evidence of the injury are again met with insults. The mind is a wonderful thing, suggests John Golding. After a while, you forget the pain. Isn't that marvelous? Isn't that a wonderful thing to come before you and say? If that were true, why should we compensate anybody under any conditions for the pain which they suffer? Let's just wait a while. Let's engage in a long lawsuit and drag our feet for five years and, by then, I guess we're pretty well assured he would have forgotten all of the pain, every bit of it; and, as to the innuendoes about the motivation of the plaintiffs in this lawsuit and his reference, which I believe to be improper, to other lawsuits which were settled, some of which were settled–I might add–while the jury was out, let me say this to you. There has been no offer to settle Mrs. Weston's case, as long as I have been the attorney for the case.

On objection by Eastern Airlines, the district judge admonished counsel to "stay off subjects which are forbidden for counsel to argue to juries whether they are true or false," and instructed the jury that offers of settlement were irrelevant to the issues before it. He concluded with the statement:

> You better obey. The next time there won't be just a reprimand. This is not an idle suggestion Mr. Smiley. . . . Counsel are forbidden to discuss that subject any more in this case.

Yet subsequently, during closing argument, Mr. Diehl, attorney for one of the plaintiffs, stated:

> He [Mr. Golding] represents with Mr. Rutherford [attorney for Aetna] the 19 insurance companies that have been busy buying off the claims of the other people and he's finally run up against three human beings sitting right there and three lawyers that ain't going to be bought.

Later, in a discussion between the court and counsel, out of the presence of the jury, about how to remedy the situation occasioned by those remarks, the court observed:

> COURT: I should have smacked him about 500 bucks before he was allowed to argue another word to the jury, but I thought this was the quickest and simplest.

In sum, it seems that Judge McMillan was carried away with enthusiasm for the seeming reasonableness and efficiency of his consolidation plan. He was so committed to it that he could not bring himself to abandon it, even when outrageous excesses by counsel for the individual plaintiffs turned trial to travesty.

What appears to have happened is that counsel for the three plaintiffs and for the government, learning the district judge's final determination that there was to be one trial and one trial only,[3] knew that they could safely practice gross abuses, in the certain knowledge that they ran no risk that the district court would employ that extreme, but ultimately efficacious sanction, namely declaration of a mistrial. While whether to grant a mistrial lies within the trial judge's discretion, it constitutes abuse of discretion to reveal, in advance, that practically no conceivable circumstances would lead him to invoke the remedy of mistrial.

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[3]On August 23, 1979, well before the commencement of trial, the district judge stated:

> I intend to have only one more trial on all the fact issues in these cases. I intend to try them all in three weeks or less.
>
> . . . I do not intend to have any separate trials later on the issues between the original defendants on the one hand and the air line controllers and the government on the other. That case will be disposed of in the same factual inquiry.

To do so predictably will cause the trial judge to lose control of the situation. That, I submit, is inescapably what happened here. To reread the egregiously unprofessional utterances (see my footnote 1 and the text of my dissent at slip op. 11) establishes, beyond peradventure, that such was the case.

In sum, the case was one where prejudicial comments by counsel, in the totality of the circumstances, necessitated reversal and a new trial. *City of Cleveland* v. *Peter Kiewit Sons' Co.*, 624 F.2d 749, 758-59 (6th Cir. 1980).[4]

In the majority's opinion we observe an open invitation to outrageous misbehavior by trial lawyers. Each plaintiff's lawyer may, from now on, be expected to ask: "What is a mere slap on the wrist, if, in exchange, I enhance my client's recovery by hundreds of thousands of dollars? Others will come to me for representation on the basis of the size of the recovery, not on whether I behaved decently in court." As politicians know, in like circumstances, the apt response is: "I don't care what you say about me, as long as you spell my name correctly."

Counsel now are insulated from any adverse consequences of utterly unprofessional conduct so long as they are careful to keep the invectives in the gutter. The majority places its *imprimatur*, its *nihil obstat*, upon "uninspired flights of invective." Slip op. at 29. The maintenance of proper courtroom standards has suffered a grievous blow from this day's work. I pray for its recovery.

In light of all of the abuse heaped on Eastern Airlines, my conscience is shocked that it should be compelled to pay damage awards extracted from the jury through resort to such offensive tactics. Thus I would reverse, in the *Arnold*, *Mihalek*, and *Weston* actions, for a new trial limited to fixing the proper amounts of

[4]Thoroughly analyzed in S. J. Peters, *Improper Argument of Counsel: City of Cleveland* v. *Peter Kiewit Sons' Co.*, 12 Toledo L. Rev. 761 (1981).

compensatory damages. Since the jury, even despite the prejudicial atmosphere of the trial, to Eastern Airline's detriment, determined that no punitive awards would be proper, that portion of the judgment should not be disturbed. The improper, incurable prejudice all flowed in one direction.

Furthermore, as to the claims against the United States and the air traffic controllers, I perceive no sufficient prejudice respecting those quite different causes of action to necessitate a new trial. The claims against the United States had to be tried non-jury, and the air traffic controllers were fully relieved of liability by reason of the judgments entered on the claims against the United States, irrespective of how they came out, 28 U.S.C. §2676. Judge McMillan was not exposed to the likelihood of prejudice in the way that the jurors may be expected to have been.

I concur with Judge Phillips in his conclusion that, for the reasons he has advanced, the Weston case must be remanded for retrial of the compensatory damages issue.

It is a source of regret to me that similar remands are not ordered in the Arnold and Mihalek cases. With hindsight we can clearly see that the consolidated cases should have been separated into two groups for purposes of trial. As they stand we are to end up having two trials anyway. Arnold and Mihalek should, with the Weston executrix, relitigate the amounts of compensatory damages they are entitled to and thereby receive fair and impartial judgments, not the ones flawed by prejudice which, by the majority's decision, they will retain.

Final Judgment of the District Court

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-76-108

RICHARD ARNOLD, IV.,

Plaintiff,

—vs—

EASTERN AIR LINES, INC.,

Defendant and
Third-Party Plaintiff,

—vs—

UNITED STATES OF AMERICA,

Third-Party Defendant.

C-C-76-249

FRANCIS C. MIHALEK,

Plaintiff,

—vs—

EASTERN AIR LINES, INC.,

Defendant and
Third-Party Plaintiff,

—vs—

UNITED STATES OF AMERICA,

Third-Party Defendant.

C-C-77-041

The Aetna Casualty and Surety Company; Aetna Insurance Company; American Empire Insurance Company; Commercial Union Insurance Company; Compagnies D'Assurances Du Groupe Concorde; Continental Casualty Company; Employers Mutual Liability Insurance Company of Wisconsin; Hartford Fire Insurance Company; Industrial Indemnity Company; Maryland Casualty Company; Reliance Insurance Company; Royal Indemnity Company; St. Paul Fire and Marine Insurance Company; Security Insurance Company of Hartford; The Travelers Indemnity Company; Underwriters at Lloyd's and Associated British Insurance Companies; United States Fidelity and Guaranty Company; United States Fire Insurance Company; Zurich Insurance Company,

Plaintiffs,

—vs—

United States of America; Bernard C. Groseclose; Alden E. Hare; William L. Hogan; Dennis L. Hunter,

Defendants.

I.

BACKGROUND

This is the concluding order and judgment in the last of the Charlotte litigation arising out of the September 11, 1974, crash of Eastern Air Lines' Flight 212 near Douglas Municipal Airport at Charlotte, North Carolina. The captioned cases present the question whether any negligence of the United States, and specifically air traffic control personnel in the Charlotte Aircraft Control Center, was one of the proximate causes of the crash of Eastern Flight 212.

In the *Aetna* case, nineteen companies who insured Eastern

against liability and the Eastern DC-9 against loss filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.* and against Bernard C. Groseclose, director of the Charlotte Tower, and three air traffic controllers on duty at the time of the crash—Alden E. Hare, William L. Hogan, and Dennis L. Hunter. The insurers demanded contribution for $11 million of the $22 million paid out in claims on account of the accident and $3,281,000 for damage to the aircraft. The insurance companies had filed administrative claims with the Federal Aviation Administration on May 9, 1976, and brought suit against the United States within six months after the administrative claims were denied. In the *Arnold* and *Mihalek* cases, defendant Eastern Air Lines brought a third-party action against the United States for contribution toward compensatory damages awarded to the passenger plaintiffs in the main actions.

These three actions, and a fourth, for wrongful death, against Eastern, were consolidated for all purposes in November 1979. The claims against the individual Federal Aviation Administration employees and the issues of the amount of compensatory damages and of liability for punitive damages in the three passenger suits against Eastern were tried to a jury. The claims against the United States were tried concurrently to the court, pursuant to 28 U.S.C. §2402. The jury awarded over $5 million in compensatory damages against Eastern in the *Arnold, Mihalek* and *Weston* cases, but denied punitive damages. The jury also found each of the government employees not liable in the *Aetna* case. I announced at the trial that I would enter a similar verdict in favor of the United States under the Federal Tort Claims Act. That verdict is filed contemporaneously with this order and judgment.

II.

THE LAST FLIGHT OF EASTERN 212.

Eastern Flight 212 left Charleston, South Carolina, around 7:00 A.M. on September 11, 1974, for a scheduled flight to

Charlotte en route to Chicago. Scheduled flying time was thirty-seven minutes. Passengers numbered seventy-eight and crew members four. The plane crashed into the ground about three miles short of the Charlotte runway, killing sixty-nine passengers and two crew members, and injuring the eleven survivors. The events of the flight were recorded in detail on the cockpit voice recorder and the flight data recorder in the aircraft and on tapes maintained at the airport. The cockpit tapes show unmistakably that the captain and the co-pilot were totally unaware that the plane was flying too low until a second or two before the crash, although numerous other people on the ground and in the airplane were so aware.

Eastern formally admitted that the crash of the plane was caused by ordinary negligence on the part of the pilots. On the other hand, the passengers and the government and the air traffic controllers contended that (a) the pilots were guilty of misconduct so reckless that it should be deemed wanton, and (b) the crash was the result of a "fatal disease" in the form of lack of cockpit discipline and altitude awareness, and that this disease was chronic and had its causes in the attitude of management towards pilot training, pilot discipline and pilot error, and that punitive damages were appropriate.

A brief summary of what the pilots did and did not do is in order.

Like other commercial planes approaching a busy airport, Eastern 212 was expected to follow prescribed directions *along* the ground and to maintain, within fairly close tolerances, a prescribed *altitude above* the ground at various locations, and to follow a prescribed *rate of descent* as it approached the landing. In the approach to Charlotte there is a checkpoint known as the "Ross Intersection" about five and one-half miles south of the north-south runway, at which point the plane, under local landing procedures, was expected to be about 1,800 feet above

the ground. Eastern 212 in fact descended to that altitude two miles before Ross and was only about 1,300 feet above the ground when it crossed the Ross checkpoint.

All the evidence was that the plane's instruments were functioning properly. Based on this and the known facts of the plane's flight path and speed furnished by the flight data recorder, it is possible actually to determine what the pilots would have seen had they looked at their instruments.

The observable rate of descent after passing the Ross checkpoint was too fast. Two vertical speed indicators in the cockpit in front of the pilots indicated that the plane was descending too rapidly. Those two warning indicators were disregarded by the pilots.

Two dials, one in front of each pilot, displayed a visual image showing the altitude at which the plane's nose was pointed with reference to the horizon. Those indicators showed that the plane's nose was pointed too low; they were disregarded by the pilots.

Four altimeters on the instrument panel, one pair operated by radio and the other pair by barometric pressure, showed the dangerously low altitude of the airplane. They also were disregarded.

A "terrain warning system" had been installed in the plane. This is a radar operated device which, when the plane gets within 1,000 feet of the ground below, displays a warning light and emits a piercing, shrill whistle which commands immediate attention. That signal went off shortly after the plane passed the Ross checkpoint. One of the pilots, without reacting to the significance of the signal, routinely turned off this indicator and the plane continued its fatal course toward the ground.

Numerous witnesses testified to seeing the airplane flying uncommonly low, headed toward the airport. Surviving passengers

in the airplane testified that they saw the ground approaching and the trees coming by the window, with no sign of awareness or alertness on the part of the crew.

The pilots' area, or cockpit, is a veritable "greenhouse," with windows out of which the pilots can look forward, sideways, up or down, and from which the ground can be seen far more readily than from passengers' seats. The surviving first officer testified in his deposition that he was too busy "flying the plane" to look out the cockpit window; that rationale, if correct, makes it all the more unexplainable how he failed to see some, at least, of the ten warnings being beamed from the instrument panel, and why he failed to heed the altitude alert signal less than three minutes before the crash, or the whistle of the terrain warning alert one minute and seventeen seconds before the crash.

Some explanation for the inattentiveness of the pilots to these numerous signals and warning devices is found in (a) the conversation that took place in the cockpit, and in (b) the attitude of Eastern's top management as described by Eastern's president, and by its chief pilot in charge of flight safety.

The conversation of the crew recorded on tapes reveals what any passenger would consider a shocking lack of attentiveness to the safety of the plane. In a thirty-minute period from takeoff to the crash, the pilots discussed numerous political, social and personal issues while neglecting the principal issue before them—the safety of themselves and the passengers. In the last eight minutes of the flight, these issues included school discipline; school race problems; big government; presidential politics; possible impeachment of President Ford; Arab land purchases; the stock market; the value of the dollar; and new cars. The impression arises from the tapes that the radio communications, the acknowledgment of signals from radio control sources, and the monitoring of the altimeters was being done on a routine if not subconscious level, while considerable conscious intelligence and energy and alertness were being devoted to conversation about

extraneous matters. Despite the conversation, the pilots managed to make most of their "call-outs," which are spoken signals to each other or to the tower indicating altitude or steps in the checklist of things to do during an approach. The evidence was clear, however, that the pilots missed at least two such call-outs; failed to cross-check their altimeters (which would have required somebody at least to look at them) and failed to discuss in advance how the approach would be made, all of which are dictated by good practice and could well have prevented the accident.

With reference to the attitude of Eastern's top management, Colonel Frank Borman, the president and board chairman, testified (1) that the extraneous conversation recorded on the tape was not extraordinary or unsafe, and (2) that there was nothing untoward in the action of the crew in shutting off the terrain warning alert. The terrain warning alert, according to Colonel Borman and other Eastern witnesses, is a sort of "cry wolf" signal which is routinely shut off without special excitement, and no significance should be attached to the fact that this crew shut it off—all this, even though to the uninitiated a terrain warning alert would at least call upon a pilot to look out the window or at the instrument panel and see whether his altimeter, including the one which measures height above the ground, was showing anything of an alarming nature. No evidence was presented indicating that such an amount of extraneous conversation was typical of well run airlines, and the court finds more credible the testimony of Scott Crossfield, a former Eastern vice president, and the testimony of FAA personnel, that such conduct is both ill-advised and indicative of a fatal complacency.

The following is a verbatim transcript of the sounds recorded on the cockpit voice recorder starting at 11:25:08 (Greenwich mean time, which is 7:25:08 Eastern Daylight time) and ending at 11:33:57 (7:33:57 Eastern Daylight time) with the sound of the initial impact. Also shown are contemporaneous communications between air traffic controllers and Eastern 212 and other air traffic in the neighborhood during that same period.

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
		1125:02	
		ATL CTR[1]	Eastern five ninety.
		1125:04	
		ATL CTR	Eastern two twelve, what's your altitude?
		1125:06	
		RDO-1[2]	Ah, we're slowing at ten.
1125:08			
CAM[3]	((Sound of pitch trim))	ATL CTR	Eastern two twelve, Roger Charlotte Approach
		1125:08	one two four zero.
		RDO-1	Okay
		1125:12	
		ATL CTR	Six nine five.
		1125:18	
		RDO-1	Charlotte Approach, Eastern two twelve descending to eight.
		1125:21	
		CLT AR[4]	'tern two twelve, Charlotte, fly heading zero four zero, vectors VOR final approach course runway three six, descend and maintain six thousand.

[1]Atlanta Center.
[2]Indicates radio transmission from EAL 212.
[3]Cockpit area microphone.
[4]Charlotte Arrival.

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
		1125:28	
1125:31		RDO-1	Okay, ah, down to six on, ah zero four zero heading.
CAM	((Sound of pitch trim buzzer))		
1125:39			
CAM 1	About a hundred and twenty-two		
1125:40			
CAM 2	Set.		
1125:43			
CAM 2	Twenty-nine thirty-four		
1125:44			
CAM 1	Roger		
1125:45			
CAM 2	Set thirty, ah, point nothing, thirty twenty-four or thirty sixteen?		
1125:49			
CAM 1	Thirty sixteen		
1125:50			
CAM 2	Thirty sixteen		
CAM ?	** four ** two		
CAM ?	**		
CAM ?	**		
CAM ?	**		
CAM 2	It's set.		
CAM 1	Four on system normal.		
CAM 1	Data bugs and altimeters.		
CAM 1	In range.		

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1126:14			
CAM 2	Okay.		
1126:15			
CAM 2	****hell, you know, they would have to have police in the school in the halls.		
CAM 1	Yeah.		
1126:24			
CAM 2	Even so they couldn't ((pause)) cover everything.		
1126:29			
CAM 1	**		
1126:34			
CAM 1	Well, what they're doing is to force all the whites to go to private schools and all the publics going to end up black. That's exactly what's going to happen.		
1126:41			
CAM 2	* I really *		
CAM 1	Then what they'll do is to come out with a law and say, okay now, we're gonna integrate the private schools, therefore—		

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
CAM 2 **			
CAM 1	—You white folks are going to have to take all these blacks going to your white schools.		
CAM	((Two clicks))		
1126:55			
CAM 1	Just can't leave well enough alone, can they?		
1126:58			
CAM 2	Government's got too big, one out of sixteen people working for the government.		
CAM	((Two clicks))		
		1127:-4	
		CLT AR	Two twelve, turn left heading three six zero.
		1127-17	
		RDO-1	Three six zero, two twelve.
1127:19			
CAM 2	Flaps five degrees, please sir.		
1127:20			
CAM	((Clicks))		
1127:24			
CAM	((Sound of pitch trim buzzer twice))		

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
		1127:26	
		N162YC+	Charlotte, Baron one six two Yankee Charley seven thousand.
		1127:32	
		CLT AR	One six two Yankee Charley, ident, maintain seven thousand altimeter three zero one six.
		N162YC	Yankee Charley.
1127:56			
CAM	((Sound of pitch trim))		
CAM	((Ratchet sound))		
1128:15			
CAM 1	((Sound of whistling))	1128:15	
		RDO	((CLT, identification of the Charlotte VOR))
1128:23			
CAM 2	I was thinking about this morning just what we were talking about, the presidential. I think if these crazy bastards don't **, don't quit screwin' around, I can see Ford gettin' his ass kicked out of there.		

*Indicates radio transmissions from other flights.

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1128:32			
CAM 1	Oh yeah, well that's what **		
1128:34			
CAM 2	** elected representatives.		
1128:36			
CAM 1	That's right, I heard this morning the news while I was		
1128:39			
CAM	((Sound of altitude alert signal))		
1128:40			
CAM 1	Might start proceedings against impeachment		
1128:42			
CAM 1	Because he (gave him) that, ah, pardon for Nixon and the Watergate people		
1128:51			
CAM 1	I think Ford's beginning to take some of his hard knocks.		
		1128:56	
		CLT AR	Eastern two twelve, turn left heading two four zero.

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
		1129:00 RDO-1	Two four zero, Eastern two twelve, we're at six.
		1129:02 CLT AR	Eastern two twelve, roger, descend and maintain four thousand.
		1129:05 RDO-1	All right, down to four.
1129:07 CAM 2	Fifteen degrees, please		
1129:08 CAM	((Clicks))		
		1129:16 CLT AR	Eastern two twelve, contact Charlotte Approach one one niner point zero.
		1129:20 RDO-1	One nineteen nothing. Good da
		1129:22 CLT AR	Seventeen, further right heading zero, make it three six zero, you're through the final now.
		1129:27 PI 917+	Yeah, we're comin' back to it.

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
		1129:30 RDO-1	Charlotte Approach, Eastern twelve, descending to four, we're turning to two forty.
		1129:35 CLT AR	Eastern two twelve, continue heading two four zero, descend and maintain three thousand.
		1129:39 RDO-1	All right, on down to three.
		1129:42 CLT AR	Piedmont nine seventeen, tower one eighteen one, slightly left of course, visibility on final three miles.
		1129:46 PI 917	Okay.
1129:48 CAM 2	One thing that kills me so damn much is all the shit that's going on now. We need to be taking some definite direction to save the damn economy of the damn country.		

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1129:54			
CAM 2	Why, these Arabs are taking up every damn thing. They bought, shit, they got so much real estate so much land, they bought an island for seventeen million dollars off Carolina. They **		
1130:01			
CAM 1	Yeah.		
1130:02			
CAM 2	The stock market and the damn Swiss are going to sink our damn money, gold over there.		
1130:07			
CAM 1	Yes sir.		
1130:10			
CAM 1	Sure are.		
		1130:11	
		CLT AR	Delta six oh eight is three and a half miles south of Ross intersection, turn left heading zero one zero, cleared VOR three six approach Tower one eighteen one.

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
		1130:20	
		DL 608+	Okay, ah, zero one zero, cleared for the approach one eighteen one.
		1130:24	
		CLT AR	Eastern two twelve, reduce to one six zero.
		1130:27	
		RDO-1	Okay.
1130:28			
CAM	((Sound of pitch trim buzzer))		
1130:32			
CAM 1	Yes sir, boy, they got the money, don't they? They got so god damn much money they don't know what to do (with it all).		
1130:35			
CAM 2	That's it, it's coming in at such a fantastic rate, you know.		
1130:38			
CAM 2	Yeah, I think, hell, if we don't do something by nineten eighty, hell, they'll own the world.		
1130:43			
CAM	**		

	INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1130:44			
CAM 1	**they owned it all at one time.		
1130:46			
CAM 2	That's right, that's no shit		
1130:47			
CAM 2	I'll be willing to go back to one car and, a lot of other restrictions if we can get something going.* Damn!		
1130:53			
CAM 1	Four for three		
1130:54			
CAM 2	And, ah, get rid of my little old money.		
CAM 1	(Just as well) do that.		
1130:58			
CAM	((Sound of pitch trim buzzer))		
1131:00			
CAM 1	I'm car poor, I got, well, I just got two now. I just gave one to my boy, but I'm buying a new one.		
1131:07			
CAM 2	Yeah.		
1131:08			
CAM 1	I ordered		

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1131:09			
CAM 2	I thought about getting one, but . . .		
		1131:10	
		CLT AR	Eastern two twelve, turn right heading three five zero, cleared VOR three six approach. You're six miles south of Ross Intersection.
		1131:16	
		RDO-1	Okay, three fifty, cleared for the approach.
1131:30			
CAM	((Sound of pitch trim buzzer))		
1131:24			
CAM 2	Shit, I'll just go ahead and keep that Toyota of mine for a while.		
1131:26			
CAM	((Sound of pitch trim buzzer))		
1131:28			
CAM 2	It's a piece of shit, but it's cheap to operate.		
1131:30			
CAM	((Sound of altitude alert signal))		

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1131:33			
CAM	((Sound of similar to seat movement))		
1131:36			
CAM 1	There's Carowinds, I think that's what that is.		
1131:38			
CAM 2	Right **		
		1131:39	
		CLT AR	Eastern two twelve, you can resume normal speed, tower one eighteen one.
		1131:42	
		RDO-1	One eighteen one, two twelve, good day.
		1131:47	
		RDO-1	Hello, ah, Charlotte Tower, it's Eastern two twelve, we're about five miles south of Ross.
		1131:5[illegible]	
		CLT TWR[5]	Eastern two twelve, continue, number two.
1131:55		1131:55	
CAM	((Sound of altitude alert signal))	CLT TWR	Seventeen, left turn ahead, ground point nine.

[5]Charlotte Tower.

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1131:58			
CAM 1	((Sound of pitch trim buzzer))		
		1131:59	
		PI 917	Seventeen.
1132:02			
CAM 1	Ross, five point five, eighteen hundred.		
CAM 2	Got it.		
1132:04			
CAM	((Sound of pitch trim buzzer))		
		1132:09	
		CLT TWR	Six oh eight's cleared to land.
		1132:11	
		DL 608	Delta six oh eight is cleared to land on three six.
1132:14		1132:14	
CAM 1	Carowinds, yes.	CLT TWR	Right.
1132:16			
CAM 2	Ah, that must, that tower, would that tower be it or not?		
1132:19			
CAM	((Sound of pitch trim buzzer))		
CAM 1	No, I ** Carowinds, I don't think it is. We're too far, too far in, Carowinds is in back of us ((pause)) I believe.		

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1132:29			
CAM 1	By God, that looks like Carowinds, I know that, it's Carowinds.		
1132:32			
CAM 2	It's supposed to be real nice.		
1132:33			
CAM 1	Yeah, that's Carowinds.		
CAM 2	Gear down, please, before landing.		
1132:36			
CAM 1	That's what that is.		
1132:36			
CAM	((Sound of landing gear extension))		
1132:37			
CAM	((Sound of switch and chime))		
1132:40	((Sound of terrain warning alert))		
1132:43			
CAM 2	That's Carowinds.		
1132:48			
CAM 1	Yeah, that's Carowinds.		
CAM	((Sound of two clicks))		

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
1132:53			
CAM 1	No smoke, ignition, radar's up***gear down.		
1132:57			
CAM	((Sound of double clicks))		
1133:03			
CAM	((Sound of pitch trim buzzer))		
1133:07			
CAM 1	Mahty damn poor		
CAM ?	**[Three ninety four]		
1133:13			
CAM 1	Raht		
1133:16			
CAM	There's, ah, Ross, now we can go on down.		
1133:20			
CAM 2	'Kay, about fifty degrees, please.		
1133:23			
CAM	((Sound of click))		
1133:24			
CAM 1	Fifty		
1133:25			
CAM	((Sound of click))		
1133:31			
CAM	((Sound of click))		
		1133:36	
		RDO-1	An' Eastern, ah, two twelve by Ross.

INTRA-COCKPIT		*AIR-GROUND COMMUNICATIONS*	
TIME & SOURCE	*CONTENT*	*TIME & SOURCE*	*CONTENT*
		1133:41	
		CLT TWR	Eastern two twelve cleared to land three six.
		1133:44	
		RDO-1	All right*.
		1133:46	
		CLT TWR	Six oh eight, left turn first available taxiway, ground point nine when clear.
1133:49			
CAM	((Sound of multiple clicks))		
1133:51			
CAM 1	Yeah, we're all ready ((pause)) All we got to do is find the airport.		
1133:56			
CAM 2	Hey!!		
CAM 1	God damn!!		
1133:57		1133:57	
CAM	((Sound of initial impact))	CLT TWR	Make a left.
1134:00	End of recording.		

III.

THE ROLE OF THE AIR TRAFFIC CONTROLLERS.

Several different types of controllers were on duty at the airport. They were:

1. Arrival Radar East. This controller, not a defendant in this suit, makes the first radio contact with an approaching airplane and instructs it how high and in what directions to fly until it gets within a few miles of the airport. He works in the TRACON room, a windowless room with radar and radio.

2. The Final Radar Controller. This position was manned by the defendant Dennis L. Hunter, who worked in the windowless TRACON room. He takes over contact with the plane from the Arrival Radar controller.

3. The Local Controller. This position was manned by the defendant Alden Hare under supervision of the defendant William Hogan. Hare, although he had been in Charlotte only a few weeks, was an experienced controller. Unlike the radar controllers, Hare and Hogan were located in the glass enclosed "tower cab" at the top of the control tower. Weather and light permitting, they could look out the window and see aircraft approaching. Their job was to take over contact with the aircraft throughout the last eight or ten miles of its approach to the runway.

4. The Ground Controller. The ground controllers are not involved in the case. Their duty is to direct airplane traffic on the ground.

All the controllers had radio equipment by which they could talk to pilots of approaching airplanes. All of them had access to the radar screens.

At 7:20:30, some fourteen minutes before the crash, the controllers switched incoming traffic from runway five (southwest-

northeast) to runway three six (south to north) because fog was moving in the area of the southwest end of runway five. Weather at 7:21:25 was reported as ". . . sky partially obscured, estimated ceiling four thousand broken, one two thousand broken, visibility one and one half, ground fog, temperature six seven, wind three six zero degrees at five, altimeter three zero one six. . . ."

Eastern 212 was directed to make a type of non-precision instrument landing known as a VOR (very high frequency omnirange) approach. The VOR is a ground based radio transmitter, located near the center of the airport, which emits an electronic signal or "radial" along a predetermined course to guide aircraft as they approach the particular runway. The 173 degree radial, extending nearly south from the VOR, was the approach course which Eastern 212 was to use. Air traffic controllers direct approaching flights so as to intersect this radial at a designated point and they then follow this radial or VOR "beam" to the runway. Once a plane is "on the beam," equipment in the aircraft enables the pilot to tell whether he is on or right or left of the approach course, while the plane's altimeters and other devices keep the pilot informed of its height above the ground.

At 7:29:16 the radar controller east "handed off" Eastern 212 to Dennis Hunter, the final radar controller. Nineteen seconds later Hunter directed Eastern 212 to descend to 3,000 feet. At 7:30:24 Hunter directed Eastern 212 to reduce its speed to 160 knots. Then, at 7:31:10, Hunter gave Eastern 212 its "final vector," a right turn to a heading of 350 degrees, and cleared the plane for approach northbound using VOR assistance on runway three six, and informed the crew that they were six miles south of the Ross Intersection. Eastern 212 acknowledged the signal.

The "final vector" is the last heading or direction of flight given by the air traffic controller. The plane is expected to follow

that directional line until it either makes a successful landing or executes a "missed approach" and pulls up and flies around to make a new approach. The "approach plate" or printed instructions for landings in Charlotte on runway three six required the pilot to maintain an altitude of at least 1,800 feet above sea level until he reached the Ross Intersection; thereafter he was permitted to land but could not descend below the published "minimum descent altitude" (1,220 feet sea level or 394 feet ground level) unless he could clearly see the runway and see his way clear to make a safe landing.

At 7:31:39 Hunter "handed off" Eastern 212 to the local control position in the tower, manned by Hare and Hogan. Eastern 212 reported to the tower at 7:31:47 that it was about five miles south of Ross and was authorized to continue, and was advised that it would be the second plane in line for landing.

At 7:33:36, Eastern 212 reported that it was "by Ross" and at 7:33:41 it was "cleared to land" on runway three six.

Twenty seconds or so later at 7:33:57, Eastern 212 crashed into the ground three miles short of the runway.

* * * * *

Radar and its uses figure heavily in the evidence. At the time of the crash, the air traffic control system in Charlotte had in operation a device called an automatic radar terminal system.

"ARTS III" is the name in the trade for that device.

It is radar linked with a computer.

The approaching aircraft has a broadcasting device called a "transponder" which emits signals showing the identification, the speed and the altitude of the plane. The ARTS III equipment picks up those signals by radar and transmits them into a display on a radar screen. The radar screen is located in a windowless lower level room called the "TRACON room." The screen is

conventional in that it has a rotating beam on which appear "blips" or points of light representing aircraft within the radar range. The "blip" for each airplane appears every four or five seconds as a light on the rotating line or beam of the radar.

ARTS III supplements that "blip" by adding a small block of printed information about the approaching airplane. This block may be enlarged or diminished in size by the controller; it is typically an inch square or less; and it shows numbers and letters indicating the identification, speed and altitude of the plane.

It is an intermittent rather than a constant display; at any given moment it may be current or it may be several seconds out of date.

In the "tower cab" where the local controllers work (and where they have windows to look out of) there is a repeater radar screen called the "Brite Scope" which also displays the ARTS III data. There is only one Brite Scope in the tower cab. Its screen is eleven inches in diameter.

Altitude is shown by the ARTS III equipment in increments of 100 feet. It is considered useable only within plus or minus 299 feet. In other words, the reading, though normally reliable to the nearest 100 feet, may be 299 feet too high or 299 feet too low. It may in addition, depending on the display mode, be four or five seconds out of date—a fact of considerable significance during periods of rapid ascent or descent. The altitude is sometimes not displayed at all at lower elevations. The ARTS III altitude readouts had not been tested for reliability below 2,000 feet, because the equipment had neither been planned nor installed with the expectation that it would be used to monitor altitude below that level or for any purpose other than separating planes from each other.

IV.

THE QUESTION OF NEGLIGENCE.

Eastern and its insurers contend that the United States was negligent on two theories: (1) That the air traffic controllers breached an alleged duty to monitor the approaching airplane with respect to its height above the ground and to detect its dangerously low altitude and advise the crew that they were flying too low; and (2) That the controllers in fact observed the plane at a dangerously low altitude and failed to warn the crew.

A. *DUTY TO MONITOR.*—Airplane pilots and air traffic controllers both have a duty to exercise due care to avoid accidents. The fact that the pilot has the primary responsibility to fly the plane safely does not absolve the controllers of their duty, nor does the fact that the pilots, as in this case, were guilty of negligence, proximately causing an accident, preclude a finding that negligence on the part of the controllers was also a proximate cause. *E.g., Rudelson* v. *United States,* 602 F.2d 1326, 1329-30 (9th Cir. 1979); *Mattschei* v. *United States,* 600 F.2d 205, 208 (9th Cir. 1979); *In Re Air Crash Disaster at New Orleans (Moisant Field), Louisiana on March 20, 1969,* 544 F.2d 270, 276 (6th Cir. 1976); *Spaulding* v. *United States,* 455 F.2d 222, 226 (9th Cir. 1972); *Ingham* v. *Eastern Air Lines, Inc.,* 373 F.2d 227, 236, 240 (2d Cir.), *cert. denied,* 389 U.S. 931 (1967).

A breach of the controllers' duty of due care may be shown by an unexcused violation of regulations, local orders, or mandatory provisions of air traffic control manuals. *See, e.g., Delta Air Lines, Inc.* v. *United States,* 561 F.2d 381, 389-90 (1st Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978); *Hartz* v. *United States,* 387 F.2d 870, 873 (5th Cir. 1968); *Ingham* v. *Eastern Air Lines,* 373 F.2d 227, 233-35 (2d Cir.), *cert. denied,* 389 U.S. 931 (1967); *Allen* v. *United States,* 370 F. Supp. 992, 999 (E.D. Mo. 1973); *Dreyer* v. *United States,* 349 F. Supp.

296, 305-06 (N.D. Ohio 1972), *aff'd sub nom. Freeman* v. *United States*, 509 F.2d 626 (6th Cir. 1975). In addition, a breach of duty may be shown by any failure to act in a reasonable manner under the circumstances. *See, e.g., Rudelson* v. *United States, supra*, 1329; *Mattschei* v. *United States, supra*, 208; *Martin* v. *United States*, 586 F.2d 1206, 1210 (8th Cir. 1978); *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1147-48 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *State of Maryland* v. *United States*, 257 F. Supp. 768, 772 (D. D.C. 1966). The court is of the opinion that plaintiffs have failed to establish the existence of a duty to use the ARTS III equipment in the manner asserted.

1. *Failure to Comply With Manuals, Directives, and Regulations.*–Plaintiffs cited a number of excerpts from manuals and directives allegedly imposing a duty on the air traffic controllers to monitor their radar screens for significant altitude deviations at the Ross Intersection. Most of the language cited does nothing of the kind. Several provisions, however, might be *thought* to support a colorable argument for such a duty. These provisions are:

1. TERMINAL AIR TRAFFIC CONTROL MANUAL (7110.8C) (Exhibit 5087)

> *"Chapter 1.–INTRODUCTION*
> *"Section 3.–DEFINITIONS*
>
> *"RADAR SERVICE.* A term which encompasses one or more of the following services based on the use of radar which can be provided by a controller to a radar-identified aircraft.
>
> * * *
>
> *"RADAR MONITORING.* The radar flight-following of an aircraft whose primary navigation is being performed by its pilot, to observe and note deviations from its authorized flight path, airway, or route. As applied to the moni-

toring of instrument approaches from final approach fix to the runway, it also includes the provision of advice on position relative to approach fixes and whenever the aircraft proceeds outside the prescribed safety zones."

* * *

2. *ORDER OF BERNARD C. GROSECLOSE* dated May 22, 1974. (CLT ATCT 7110.34). Effective June 9, 1974. (Exhibit 5009A)

"SUBJ.: Coordination of Arriving Aircraft.

"1. *Purpose.* This order specifies the procedure to be used to effect non-verbal coordination between arrival radar positions and local control position, concerning arriving aircraft that are being 'tracked' by the ARTS III.

"a. LC shall 'quick look' the arrival radar position, or positions, at which the landing sequence is being established and visually monitor the landing sequence.

"b. All aircraft landing at CLT shall be 'tracked' to the maximum extent possible. . . ."

* * *

3. FACILITY MANAGEMENT HANDBOOK (7210.3B) (Exhibit 5086)

"PART III TERMINAL TRAFFIC CONTROL FACILITIES

"Chapter 15. RADAR

"Section 1. GENERAL

"¶1471. RADAR UTILIZATION

"a. Approved radar systems may be used for the following purposes:

* * *

"(5) monitoring instrument approaches."

The quoted provisions may very well show what, within limitations, would have been a reasonable use of the ARTS III equipment; however, they fall short of demonstrating a duty on the controllers to monitor the altitude of the approaching plane and to warn the crew that they were flying too low. With one exception, the language relied on is merely suggestion or information regarding *possible* uses of the radar equipment. To the extent that it may refer to providing radar altitude advisories on the final approach, it is clear that such service was not expected nor to be provided except upon *precision approaches* or for precision radar approaches (PAR). Flight 212 had not requested nor received a clearance for a precision approach. As to precision radar approaches, the Charlotte air terminal was not even equipped to provide such service. Eastern produced one witness, a former controller, who attempted to construe paragraph 7110.8C to require such service, but he offered no support for his construction nor any evidence that anybody else had ever so understood that paragraph.

Moreover, not a single pilot among the hundreds who might have been called, and not a single controller was brought forward to testify that such a service was, in fact, provided anywhere in the country at that time by aircraft control centers with comparable equipment, or that pilots expected or received such a service on non-precision approaches like this one, or would have found it useful or would have relied on it if it had been provided. Indeed, Thomas Oakes, an Eastern vice president and its former chief pilot, testified by deposition that ARTS was designed as an aid only to separate airplanes from each other; that it was not intended as an aid to approaches nor as a system to separate planes from the ground; and that maintaining a safe altitude on approach was strictly the responsibility of the crew. That was the consensus of all the witnesses on that subject.

As to the May 22, 1974 order of Bernard Groseclose, it is clear from the evidence that though its language is mandatory,

it does not impose the duty Eastern contends it does. It requires controllers only to "visually monitor the *landing sequence*"—that is, the sequence or order in which airplanes arrive and land and the distance between those airplanes. The instruction that all landing aircraft "shall be 'tracked' to the maximum extent possible" (quotes in original) obviously refers only to a duty to establish a flight track-tag on the radar screen for each arriving flight and not to any duty on the part of the controllers to keep watch on how high the approaching plane is above the ground on final approach to the runway. *Compare* Terminal Air Traffic Control Manual, Section 21, ¶1693(c).

2. *Reasonable Conduct Under the Circumstances.*—During the last two and one-half minutes of the flight (from about six miles before Ross until the impact) no one in the tower is shown to have been actually aware of the altitude of Eastern 212. No one actually perceived its altitude on the radar data block nor checked the radar screen for that specific purpose. The ARTS III equipment was functioning normally. The evidence shows that Eastern 212 went below 1,800 feet MSL (mean sea level) about two miles before the Ross Intersection, which was about four or five miles before the crash. When Eastern 212 crossed the final approach fix at Ross it was about 460 feet below the minimum prescribed altitude for that point. If the radar, contrary to the evidence, were completely accurate below 2,000 feet, it would then have shown the plane as being at 1,300 instead of 1,800 feet. If any controller had observed the plane to be 500 feet low at Ross, he probably would have and should have advised the crew. However, there is no direct evidence as to what the radar screen or the Brite Scope display did in fact show either at Ross or at any point after Eastern 212 was cleared for the approach, or whether there was an altitude display. There was unrebutted testimony that the ARTS III equipment often ceases to give altitude readouts at lower altitudes.

The fact that if the dangerous altitude was shown on the Brite Scope and if the controllers had seen it and warned the

crew, the crash might have been prevented, is not enough to establish negligence.

The FAA, as noted above, had never ordered that ARTS III be used to tell aircraft how high they were on final approach. There is no evidence that these or any airplane pilots on a non-precision approach either sought or expected the tower to tell them their altitude. Whether today, in light of six years of additional experience and further refinements of the equipment, a monitoring duty may exist, is a question that neither this court nor the jury had to decide.

It is repetitious, but I will repeat that:

(a) ARTS III equipment was designed to separate aircraft from each other rather than to separate aircraft from the ground.

(b) ARTS III altitude readings are rounded off to the nearest 100 feet and are to be relied on only within 299 feet on either side of that reading.

(c) The readings may be four or more seconds out of date when read.

(d) The readings are not shown to be reliable at lower altitudes and may not even appear at all at lower altitudes.

By contrast, once cleared, as Eastern 212 was, for final approach, the pilot has the sole authority to determine whether he can land safely. *See* 14 C.F.R. §§91.116(f), 91.117(b), 121.627(a) (1974). A single altimeter is normally enough to tell a pilot his altitude. Pilots routinely land without altitude assistance from controllers. This crew had numerous safety systems which were functioning normally, telling this crew of their dangerous proximity to the ground. Their altimeters gave precise instantaneous readings of their altitude.

The efficient and intended use of the ARTS equipment—to

keep planes from crashing into each other—is illustrated by the use actually made of the equipment seconds after this crash occurred. Eastern 212 in fact crashed at 7:33:57. Thirty seconds later, the following flight, Eastern 352, heading in an easterly direction, was directed to turn left to intercept the approach course and to contact the tower. Eastern 370, which was to follow Eastern 352, took Eastern 352's instruction and turned from a southerly to a northerly heading and switched frequencies. Eastern 352 ignored its vector and continued in an easterly direction through the approach course. The final vector controller, Mr. Hunter, was thus confronted with a serious separation problem between Eastern 370 and a light aircraft, neither aircraft being on his frequency at the time. He had to vector these aircraft to avoid a mid-air collision. Furthermore, after Eastern 212 crashed, the field was closed, and arriving aircraft were put in a holding pattern southwest of the airport, separated from each other vertically by 1,000 feet. Eastern 590 was assigned an altitude of 4,300 feet. The ARTS III altitude data, being used for its customary purpose of insuring vertical separation between flights, indicated that Eastern 590 was flying at 4,700 feet rather than its assigned 4,300 feet. Eastern 590 was alerted and told to fly at the proper altitude.

Without specific instructions via manual or otherwise, air traffic controllers are not obligated to keep watch on their instruments for the purpose of warning pilots of information which is already being supplied them by their own equipment, and which by ordinary care they would themselves know. *See Crossman* v. *United States*, 378 F. Supp. 1312, 1318-19 (D. Ore. 1974).

At least one court has specifically held that the duty of controllers to give altitude advisories ceases once the aircraft has intercepted the VOR radial designated as the final approach course. *Brock* v. *United States 14 Aviation Cases*, 18,246 (E.D. Va. 1977), *aff'd*, 596 F.2d 93 (4th Cir. 1979). The court considers the reasoning of the *Brock* court persuasive. The *Brock*

case and this case both involve crashes during the 1974 occurring on non-precision approaches to air terminals with ARTS III equipment. Any differences in the factual situation have the effect only of making the case for recognizing a duty of providing terrain separation even weaker in this case than it was in *Brock*.

Plaintiffs cite several cases in support of the asserted duty of the controllers to "monitor" the altitude of airplanes above the ground; they are all distinguishable. To the extent that they deal with "monitoring" they involve failures to separate aircraft from each other or to observe *horizontal* deviations from an assigned course.

Eastern's first theory (duty to monitor the altitude of the approaching plane), in short, is facts without law.

B. *FAILURE TO WARN*.—This, Eastern's second theory, appears to be law without facts. It is not disputed that controllers should advise pilots of dangerous situations that actually come to their attention. However, I do not find from the evidence that the controllers in fact knew of Eastern 212's danger before the crash. Various editions of the tapes of conversations in the radar stations were read or played in evidence. An expert testifying for Eastern and its insurers said that at 7:33:57, the exact moment of impact, he heard the words "Holy Christ" on the tape of voices in the ground control room. At 7:36:19 on the same tape he claims to have heard "You could tell he was in trouble." At 7:34:48 he testified that he heard the words "I'm telling ya, Hare did that." I was unable to translate the weird sounds on the tape into the meanings placed upon them by that expert; neither was an expert for the government and neither, apparently, were members of the jury. Moreover, even if Eastern's version is taken at face value, the comments after the crash by unidentified voices do not provide a basis for a finding of fact that the controllers knew of Eastern 212's danger *before* the crash. Eastern and its insurers also point to a transmission from

local control at 7:37:49 reading "What time did you sign off, uh, about five minutes ago?" with an affirmative answer in the background. They contend that this shows that someone was trying to cover up the fact that the local control position was being worked by a newcomer unfamiliar with Charlotte procedures. I am unable to accept that theory, but even if it is accepted it does not prove that the controllers saw and could have prevented the crash. The controllers testified and the court finds that they did not know of Eastern 212's danger until after it had crashed.

V.

PROXIMATE CAUSE.

In addition to proving negligence, Eastern must prove such negligence to be a proximate cause of the injury. The injury must be a natural and probable consequence of the negligence, a consequence that could reasonably be expected to follow the failure to use due care. *E.g., Phelps* v. *Winston-Salem*, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967). Thus, if the controllers had indeed observed Eastern 212 to be flying too low at or near the Ross Intersection, a failure to warn could reasonably be expected to be a cause of the ensuing accident.

However, Eastern's first theory of liability does not satisfy the test. The aircraft cockpit was full of safety devices, warning systems and procedures. Ordinarily a pilot can land his plane safely using a single altimeter. Commercial airline pilots are highly skilled. A crash landing three miles short of the runway is not a reasonably foreseeable consequence of failure to use ARTS III equipment to check an approaching plane's altitude at the final approach fix. An accident of this sort could occur only through pilot inattentiveness and carelessness of a truly extraordinary nature. Failure of defendant controllers to observe the altitude of the plane at Ross Intersection, if a cause at all, was a remote rather than a proximate or producing cause.

Moreover, the court is not persuaded, as apparently neither were the jury, that a warning from the tower, if it had been received, would have prevented the accident. The crew were not simply inadvertent but rather were grossly negligent. They distracted themselves with extraneous matters; they did not look out the window to see what numerous others saw—that they were dangerously low; they failed to comply fully with procedures instituted to keep flight crews awake and conscious of their altitude while descending and landing; they ignored the visual readings of five pairs of altimeters and beacons showing that they were too low and descending too fast; and they also ignored a shrill whistle and red light which called their low altitude emphatically to their attention. I am unable to find that an additional request from an air traffic controller that the pilot check his altitude would have changed the outcome.

On the basis of the foregoing subsidiary findings and conclusions, the court makes the following findings of fact and conclusions of law:

1. This court has jurisdiction over the parties and over the subject matter of these suits pursuant to 28 U.S.C. §1346.

2. Because North Carolina is the place where both the injury and the alleged negligence occurred, the issues in this case are to be determined under the law of North Carolina, to the extent that state, rather than federal, law applies.

3. The United States and its agents had no duty to monitor the data blocks on the ARTS III and the BRITE screens for purposes of verifying the altitude of incoming flights at the Ross Intersection or at any other point in the final approach.

4. The duty of the United States with respect to altitude deviations during the final approach was limited to notifying incoming pilots of dangerous or potentially dangerous deviations of which air traffic control personnel had actual notice.

5. The United States and its agents had no knowledge of the

dangerously low flight path of EAL 212 prior to impact and this lack of knowledge was not due to any negligence on the part of the United States or its agents.

6. No act of commission or omission, negligent or otherwise, of the United States or its agents was a proximate cause of the crash of EAL 212.

7. The negligence of Eastern was the sole proximate cause of the crash.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That plaintiffs Aetna *et al.* and the third-party plaintiff Eastern Air Lines, Inc. have and recover nothing from the United States.

2. That the motion to set aside the jury verdict in favor of Groseclose, Hare, Hogan and Hunter is denied.

3. That, in conformity with the verdict of the jury, plaintiffs Aetna *et al.*, have and recover nothing from defendants Groseclose, Hare, Hogan and Hunter.

4. That the action of plaintiffs Aetna, *et al.*, and the third-party actions of Eastern Air Lines, Inc. against the United States are dismissed.

5. That the United States and the individual defendants Groseclose, Hare, Hogan and Hunter recover their costs.

This 12 day of March, 1980.

JAMES B. MCMILLAN
United States District Judge

For purposes of clarification, paragraph number 4 of the judgment entered in these actions on March 12, 1980, is hereby amended to read: "that the action of plaintiffs Aetna *et al.* against the United States and individual defendants Groseclose, Hare,

Hogan, and Hunter, and the third-party actions of Eastern Air Lines, Inc. against the United States be and the same hereby are dismissed.

IT IS SO ORDERED, this 28 day of March, 1980.

JAMES B. MCMILLAN
United States District Judge

Order of the District Court Amending Judgment

IN THE
DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-76-108

RICHARD ARNOLD, IV.,

Plaintiff,

—VS—

EASTERN AIR LINES, INC.,

Defendant and
Third-Party Plaintiff,

—VS—

UNITED STATES OF AMERICA,

Third-Party Defendant.

C-C-76-249

FRANCIS C. MIHALEK,

Plaintiff,

—VS—

EASTERN AIR LINES, INC.,

Defendant and
Third-Party Plaintiff,

—VS—

UNITED STATES OF AMERICA,

Third-Party Defendant.

Order of the District Court Amending Judgment

C-C-77-041

The Aetna Casualty and Surety Company; Aetna Insurance Company; American Empire Insurance Company; Commercial Union Insurance Company; Compagnies D'Assurances Du Groupe Concorde; Continental Casualty Company; Employers Mutual Liability Insurance Company of Wisconsin; Hartford Fire Insurance Company; Industrial Indemnity Company; Maryland Casualty Company; Reliance Insurance Company; Royal Indemnity Company; St. Paul Fire and Marine Insurance Company; Security Insurance Company of Hartford; The Travelers Indemnity Company; Underwriters at Lloyd's and Associated British Insurance Companies; United States Fidelity and Guaranty Company; United States Fire Insurance Company and Zurich Insurance Company,

Plaintiffs,

—vs—

United States of America; Bernard C. Groseclose; Alden E. Hare; William L. Hogan; Dennis L. Hunter,

Defendants.

For purposes of clarification, paragraph number 4 of the judgment entered in these actions on March 12, 1980, is hereby amended to read: "that the action of plaintiffs Aetna *et al.* against the United States and individual defendants Groseclose, Hare, Hogan, and Hunter, and the third-party actions of Eastern Air Lines, Inc. against the United States be and the same hereby are dismissed.

IT IS SO ORDERED, this 28 day of March, 1980.

JAMES B. MCMILLAN
United States District Judge

Order of the District Court Amending Findings of Fact

IN THE
DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-76-108

RICHARD ARNOLD, IV.,

Plaintiff,

—VS—

EASTERN AIR LINES, INC.,

Defendant and
Third-Party Plaintiff,

—VS—

UNITED STATES OF AMERICA,

Third-Party Defendant.

C-C-76-249

FRANCIS C. MIHALEK,

Plaintiff,

—VS—

EASTERN AIR LINES, INC.,

Defendant and
Third-Party Plaintiff,

—VS—

UNITED STATES OF AMERICA,

Third-Party Defendant.

Order of the District Court Amending Findings of Fact

C-C-77-041

The Aetna Casualty and Surety Company; Aetna Insurance Company; American Empire Insurance Company; Commercial Union Insurance Company; Compagnies D'Assurances Du Groupe Concorde; Continental Casualty Company; Employers Mutual Liability Insurance Company of Wisconsin; Hartford Fire Insurance Company; Industrial Indemnity Company; Maryland Casualty Company; Reliance Insurance Company; Royal Indemnity Company; St. Paul Fire and Marine Insurance Company; Security Insurance Company of Hartford; The Travelers Indemnity Company; Underwriters at Lloyd's and Associated British Insurance Companies; United States Fidelity and Guaranty Company; United States Fire Insurance Company and Zurich Insurance Company,

Plaintiffs,

—vs—

United States of America; Bernard C. Groseclose; Alden E. Hare; William L. Hogan; Dennis L. Hunter,

Defendants.

Counsel has called the attention of the court to certain errors in the findings of fact entered in the above cases on March 12, 1980. While the errors have no material bearing on the ultimate result, counsel's suggested changes are manifestly correct, on the record, and should be adopted.

Order of the District Court Amending Findings of Fact

IT IS THEREFORE ORDERED that the findings of fact entered in the above cases on March 12, 1980 be, and the same hereby are, corrected to read as follows:

Page	*Line*	*Present Text*	*Should Read*
4	15	above the ground	above sea level
4	17	above the ground	above sea level
4	30	altitude	attitude
5	1	four	five
5	2	other pair	other three
7	2	terrain warning alert	terrain warning system
7	7	terrain warning alert	terrain warning system
31	3	five pairs of	five

The Clerk is directed to make these changes in ink on the original of the judgment.

This 28 day of March, 1980.

JAMES B. MCMILLAN
United States District Judge

Office-Supreme Court, U.S.
FILED
MAR 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1177

In the Supreme Court of the United States

OCTOBER TERM, 1982

AETNA CASUALTY AND SURETY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the allegedly improper conduct of trial counsel did not constitute reversible error.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is reported at 681 F.2d 186. The opinion of the district court (Pet. App. A49-A93) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1982, and a petition for rehearing was denied on August 19, 1982. On November 16, 1982, the Chief Justice granted an extension of time to January 14, 1983, within which to petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action arises out of the September 11, 1974, crash of Eastern Air Lines Flight 212 near Douglas Municipal Airport at Charlotte, North Carolina. The petitioners are Aetna Casualty and Surety Company and 18 other insurance companies who insured Eastern against liability and the owner/lessor of the DC-9 aircraft against loss. Petitioners brought this action in the United States District Court for the Western District of North Carolina, seeking contribution from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, and from three air traffic controllers (respondents Hare, Hogan, and Hunter) and the Chief of the Charlotte Tower (respondent Groseclose) under state common law. Petitioners alleged that the government's and the air traffic controllers' concurring negligence rendered them liable for $11 million of the $25 million in claims paid out on account of the crash (Pet. App. A50-A51).

This action was consolidated for all purposes with three actions brought against Eastern Air Lines by injured or deceased passengers of Eastern 212.[1] Petitioners' and Eastern's motions to sever the cases for separate trials were denied, and petitioners' claims against the air traffic controllers were tried to a jury. The FTCA claim against the United States was tried concurrently to the court. See 28 U.S.C. 2402.

At the conclusion of trial, the jury found that the individual respondents were not liable in contribution to petitioners.[2] The district court similarly found no negligence on the

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[1] In two of the three passenger cases Eastern brought third-party actions against the United States seeking contribution toward any compensatory damages awarded to the plaintiffs (Pet. App. A51).

[2] In the three passenger cases, the jury denied the plaintiffs punitive damages but awarded them over $5 million in compensatory damages.

part of the United States under the Federal Tort Claims Act (Pet. App. A51). The court found no duty on the part of the air traffic controllers to monitor Eastern 212 with respect to its altitude (*id.* at A77-A84). The court noted that once an airplane is cleared for final approach, as Eastern 212 was, "the pilot has the sole authority to determine whether he can land safely" (*id.* at A82). Moreover, the court found that the air traffic controllers did not actually know of Eastern 212's danger before the crash and therefore did not breach their duty to warn the plane of known dangerous situations (*id.* at A77, A81, A84-A85). The court found that "[a]n accident of this sort could occur only through pilot inattentiveness and carelessness of a truly extraordinary nature" (*id.* at A85). Thus, any possible negligence of the United States or the individual air traffic controllers, "if a cause at all, was a remote rather than a proximate or producing cause" (*ibid.*).

2. The court of appeals affirmed this aspect of the judgment of the district court (Pet. App. A1-A48). Petitioners argued in the court of appeals, as they do here, that improper conduct by opposing counsel denied them a fair trial. After carefully setting forth and analyzing petitioners' contentions (Pet. App. A12-A32), the court of appeals found that "the district court properly acted within its discretion" in declining either to set aside the jury's verdict or to grant a new trial on this ground. The court of appeals, in any event, concluded that the conduct of counsel was not likely to have affected the outcome of petitioners' claims against the United States and the individual respondents. The court noted that "the evidence adduced readily explains the jury's determination that if there was any negligence on the part of the air traffic controllers it was * * * a 'remote rather than a proximate cause' " (*id.* at A32).[3]

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[3]The court of appeals also found no abuse of discretion in the decision of the district court to deny the motions to sever the actions for trial

Judge Murnaghan, concurring in part and dissenting in part, would have reversed the three passenger actions for a new trial to fix the proper amounts of compensatory damages because of the conduct of opposing counsel (Pet. App. A37-A48). However, "as to the claims against the United States and the air traffic controllers, [he] perceive[d] no sufficient prejudice respecting those quite different causes of action to necessitate a new trial" (*id.* at A48). Judge Murnaghan noted that the claims against the United States had to be tried to the court and the trial judge "was not exposed to the likelihood of prejudice in the way that the jurors may be expected to have been" (*ibid.*). The air traffic controllers, moreover, were "fully relieved of liability by reason of the judgments entered on the claims against the United States, irrespective of how they came out" (*ibid.*, citing 28 U.S.C. 2676).[4]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and presents no issue warranting further review.

1. Petitioners contend that, because of the conduct of counsel for the United States, the court of appeals should have reversed and remanded petitioners' case for a new trial

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(Pet. App. A8) or in the district court's refusal to admit certain evidence pertaining to the training and supervision of the air traffic controllers (*id.* at A33). Petitioners have not challenged these rulings in this Court.

[4]Petitioners' petition for rehearing was denied on August 19, 1982. The court of appeals granted a petition for rehearing en banc in the three passenger cases on December 23, 1982. Petitioners have requested this Court to defer consideration of their petition for a writ of certiorari pending final disposition of the passenger cases by the court of appeals. Because the outcome of the passenger cases in the court of appeals cannot affect the decision in this case, and because petitioners' fact-bound claims plainly do not warrant review by this Court, we see no reason to defer consideration of this petition for the indefinite period suggested by petitioners' motion.

(Pet. 10-11). The court of appeals correctly concluded that the district court acted within the proper bounds of its discretion in declining to set aside the jury's verdict on this ground. The court of appeals recognized that (Pet. App. A12):

> Of the many details of trial management necessarily committed to broad trial court discretion, perhaps none is more due appellate deference than conduct of non-judicial participants in the process that is asserted unfairly to have prejudiced the jury. *See Arkwright Mutual Insurance Co.* v. *Philadelphia Electric Co.*, 427 F.2d 1273, 1277 (3d Cir. 1970); *see generally* F. James and G. Hazard, *Civil Procedure* § 7.18 (2d ed., 1977). This is a matter preeminently for on-the-scene sensing by trial judges. At that vantage point demeanor—here that of the jury—can be observed; the impact of efforts to control and dissipate prejudicial effects can be assessed in light of the interpersonal relationship that inevitably develops between trial judge and jury; and the actual effect of the conduct upon jurors — an effect frequently at odds with or actually counter-productive to that improperly intended by the offender — can be gauged first-hand. For the very reason that the problem is essentially one of assessing the immediate emotional and psychological effect of specific actions and words on particular people, the appellate vantage point in retrospective review on a cold written record is especially subject to misperceptions of what actually transpired and, more subtly, to miscalculations of likely effects.

The court of appeals noted that the "critical inquiry" was whether the trial judge's response to the purported misconduct of counsel "constituted a prejudicial abuse of discretion" (Pet. App. A17). In answering this question, the court of appeals thoroughly discussed the challenged conduct of

counsel and analyzed the propriety of the trial court's response to it (*id.* at A14-A24). The court of appeals noted that the nature of the issues in petitioners' and the passenger cases invited a broad range of evidence of an inescapably volatile nature (*id.* at A19). The cases involved allegations of gross, wanton, and consciously indifferent conduct, and "the dominance of such issues" justified "cautious policing of emotional sallies during trial" (*id.* at A20). Moreover, the court stated that, because the great weight of "wholly proper evidence" disfavored petitioners, an appellate court should exercise "great caution" in setting aside the verdict against them on the ground of improper influence (*ibid.*). The court of appeals concluded that the challenged arguments of counsel were adequately dissipated by the general cautionary instructions of the trial judge (*id.* at A20, A22).

In any event, the court of appeals noted that any misconduct by counsel was not a "reasonably probable" explanation for the jury's verdict against petitioners on their contribution claim (Pet. App. A31-A32). "Laying aside all the other factors, the critical circumstance here is that, to us, the issue of concurring negligence — of proximate causation —on which this claim turned, simply cannot be assessed as one so 'close' that we would be justified in attributing the verdict upon it to any such improper influence. While the issue going in was obviously an honestly disputable one, the evidence adduced readily explains the jury's determination that if there was any negligence on the part of the air traffic controllers it was, in the district court's stated analysis, a 'remote rather than a proximate cause.' We are not prepared to reject that ready and proper explanation in favor of the improper one for which [petitioners] contend[ ]. Obviously we find no abuse of discretion in the district court's refusal to set aside this verdict on this ground." *Id.* at A32.

2. In spite of the considerations mentioned above, petitioners contend that, if the trial behavior of counsel had been controlled, there would have been a jury verdict against the individual respondents because "[t]he negligence of the individual respondents was blatant" (Pet. 13). Two courts, however, have looked at the facts of this case and have concluded that there was no negligence on the part of the United States or any of its employees. This Court has often held that it will not "review concurrent findings of fact by two courts below" except upon "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). There has been no such showing here.[5]

Eastern Flight 212 crashed three miles short of the Charlotte, North Carolina runway on September 11, 1974, killing 71 people and severely injuring 11 survivors. The cockpit tapes show that the captain and co-pilot were totally unaware that the plane was flying too low until seconds before the crash (Pet. App. A51-A52).[6] The crew, moreover, disregarded at least 10 warnings of the plane's dangerously low altitude (*id.* at A53).[7]

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[5]Petitioners make much of the fact that the district court initially determined that the jury would render an advisory verdict against the United States, but later did not submit the case against the United States to the jury (Pet. 3, 13). Petitioners do not explain how they may have been prejudiced by these events.

[6]A transcript of the conversations in the cockpit and on the ground from 11:25:08 to 11:33:57, the time of impact, can be found at Pet. App. A56-A72. The conversation in the cockpit concerned various topics totally unrelated to the flight.

[7]The district court found that the crew of Eastern 212 disregarded (Pet. App. A53):

a) two warning indicators showing that the plane was descending too rapidly;

b) two indicators showing that the plane's nose was pointed too low;

Petitioners contend that, notwithstanding the negligence of the crew, the United States and the individual respondents negligently failed to warn Eastern 212 of its low altitude (Pet. 14-17). At the time of the crash, the air traffic control system in Charlotte had an automatic radar terminal system that was coupled with a computer to provide altitude data on incoming air traffic ("ARTS III"). However, the district court found that, contrary to petitioners' assertions, the ARTS III equipment had neither been planned nor installed with the expectation that it would be used to monitor altitude below 2,000 feet (Pet. App. A76).[8] The equipment was designed and utilized solely to separate incoming and departing planes from one another (*ibid.*). The court similarly found nothing in the FAA's manuals, directives, or regulations that required the controllers to use the ARTS III equipment to monitor the altitude of approaching planes (*id.* at A78-A80).[9] Finally, because the accident could only have occurred "through pilot inattentiveness and carelessness of a truly extraordinary nature" (*id.* at 85), the court was "not persuaded, as apparently neither [was] the jury, that a warning from the tower, if it had been received, would have prevented the accident. The crew [was] not simply inadvertent but rather [was] grossly negligent" (*id.* at A86).

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c) four altimeters on the instrument panel showing the dangerously low altitude of the plane;

d) the "terrain warning system," consisting of a warning light and a whistle (the signal and whistle were simply turned off and ignored).

[8]The ARTS III equipment, though normally reliable to the nearest 100 feet, may be 299 feet too high or 299 feet too low. In addition it may be four to five seconds out of date, a crucial defect if the equipment is to be used to monitor rapid ascents or descents (Pet. App. A76).

[9]The district court found that no one in the control tower was actually aware of the altitude of Eastern 212 (Pet. App. A81).

The record, therefore, provides ample support for the findings of the district court and jury regarding the liability of the United States and the individual respondents. These findings were properly upheld by the court of appeals, and present only factual issues that do not warrant review by this Court.

3. Finally, the finding of the district court on petitioners' FTCA claim obviates the necessity for further review of petitioners' allegations of misconduct by government counsel. Petitioners' claim against the United States was tried to the court. The judge obviously was capable of rejecting any prejudicial comments of counsel. As Judge Murnaghan noted in concurring in the judgment upholding the verdicts in favor of the United States, "Judge McMillan was not exposed to the likelihood of prejudice in the way that the jurors may be expected to have been" (Pet. App. A48). The district court found for the United States, and that decision provides a complete bar to the claims against the individual air traffic controllers. 28 U.S.C. 2676.[10] There is, therefore, no substantial likelihood that the alleged misconduct of counsel actually prejudiced petitioners, and there is accordingly no need for further review of petitioners' contentions.[11]

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[10]28 U.S.C. 2676 provides:

> The judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

[11]Contrary to the assertions of petitioners (Pet. 17), the allegedly prejudicial comments of counsel did not prevent them from obtaining a directed verdict against the United States. Even if the jury had found against the individual respondents, the judgment of the district court for the United States under the FTCA would have constituted a bar to the claims against the FAA employees. *Satterwhite* v. *Bocelato*, 130 F. Supp. 825, 829, (E.D.N.C. 1955); *Lauterbach* v. *United States*, 95 F. Supp. 479, 482 (W.D. Wash. 1951). See *United States* v. *Gilman*, 347 U.S. 507, 509 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

MARCH 1983

DOJ-1983-03

Office-Supreme Court, U.S.
FILED
APR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYD'S AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN and DENNIS L. HUNTER,

Respondents.

PETITIONERS' REPLY BRIEF

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McCullough v. *Beech Aircraft Corp.*, 587 F.2d 754 (5th Cir. 1979) 4

Pradier v. *Elespuru*, 641 F.2d 808 (9th Cir. 1981) 10

Price v. *Glosson Motor Lines*, 509 F.2d 1033 (4th Cir. 1975) 3

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United States v. *Gilman*, 347 U.S. 507, 509 (1954) 8

United States v. *Holley*, 502 F.2d 273 (4th Cir. 1974).. 3

United States v. *Pfizer, Inc.*, 560 F.2d 319 (8th Cir. 1977) 9

Statute:

28 U.S.C. §2676 (1976) 1, 6, 8

Other Authorities:

Restatement (Second) of Agency §219(1) 7

9 Wright & Miller, Federal Practice and Procedure, §2255 (1971) 3

PETITIONERS' REPLY BRIEF

Preliminary Statement

Petitioners herein are submitting this reply brief because respondents in their brief in opposition have taken a position that does not comport to the actual facts and circumstances of this case. The Solicitor General is contending that, even if there had been misconduct by opposing counsel during trial so as to deny petitioners a fair jury trial against the individual respondents, such misconduct, in the final analysis, made no difference since the case against the Government was decided by the District Court Judge who could not be prejudiced. In order to reach this unique conclusion, the respondents argue that the record shows that the individual respondents were not liable and that even if they were the decision by the District Court in favor of the Government bars petitioners' claim against the individual respondents under 28 U.S.C. §2676. In advancing this position the Solicitor General has apparently recognized that there was misconduct by opposing counsel but has incredibly argued that it made no difference to the outcome of the case.[1]

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[1]In addition, in footnote 4 on page 4 of respondents' brief, the Solicitor General has opposed petitioners' pending motion to defer consideration of the petition on the ground that the "outcome of the passenger cases in the Court of Appeals cannot affect the decision in this case." However, the Solicitor General has failed to apprise this Court that in two of the cases that are still under consideration by the Fourth Circuit on Eastern's petition for a rehearing *in banc* (in which cases Eastern brought third-party actions against the Government seeking contribution from the Government), the Government not only submitted a brief in opposition to the motion for a rehearing *in banc* but also argued on the merits on the rehearing on February 8, 1983. Clearly, any decision by the Fourth Circuit on Eastern's motion for a rehearing *in banc* would affect petitioners' instant petition. If the Court of Appeals denies Eastern's petition, Eastern will probably petition to this Court and if the Court of Appeals reverses the Panel below, their opinion will probably be relevant to this Court's consideration of petitioners' petition for writ of certiorari. Therefore, petitioners respectfully pray that this Court defer consideration of the instant petition until such time as the Court of Appeals has rendered a final decision on Eastern's petition for a rehearing *in banc*.

Argument

As has been implicitly recognized by respondents, and as has been discussed at length in the petition (Pet. 5-13), the prejudicial remarks and comments made by opposing counsel were so intense, unabating, blatant and beyond judicial control that petitioners herein were clearly denied a fair and impartial jury trial in their claims against the individual respondents. In attempting to obscure the real issue before this Court, respondents have stated as the grounds for their opposition that "[t]he decision of the Court of Appeals is correct, does not conflict with any decision of this Court or any Court of Appeals and presents no issue warranting review" (Resp. 4). However, the actual issue before this Court is whether opposing counsel's conduct during trial, which was sanctioned by the majority opinion below, "was such a departure from the accepted and usual course of judicial proceedings so that petitioners were denied a fair jury trial against the individual respondents and prejudiced in their case against the respondent United States" (Pet. i). Indeed, respondents, rather than addressing the merits of the petition, merely paraphrase the Court of Appeals' majority opinions and conclude that even if petitioners were prejudiced: (1) "[t]he challenged arguments of counsel were adequately dissipated by the general cautionary instructions of the trial judge" (Resp. 6); (2) "[t]he evidence adduced readily explains the jury's determination that if there was any negligence on the part of the traffic controllers it was, in the district court's stated analysis, 'a remote rather than proximate cause' " (Resp. 6) and that additionally "[t]his court has often held it will not 'review concurrent findings of fact by two courts below "except" upon a very obvious and exceptional showing of error' " (Resp. 7); and (3) since "petitioners' claim against the United States was tried to the Court" Judge McMillan "was capable of rejecting any prejudicial comments of counsel" (Resp. 9).

1. As recognized by Judge Murnaghan, the so-called cautionary remarks by the District Court were inadequate to prevent the jury from being prejudiced by opposing counsel's com-

ments (A45-A47). In fact, the District Court not only failed to restrain counsel from their prejudicial outbursts and comments but compounded the prejudice by inadequately instructing the jury on petitioners' claim.

Petitioners had requested the District Court to charge the jury as a matter of law that both the pilots of EA 212 and the air traffic controllers had a concurrent responsibility for the safety of the aircraft and the passengers (Supp. Inst. No. 39, JA-VI, 2118-19). The District Court refused to give such an instruction and instead repeatedly told the jury that the issue of whether or not the air traffic controllers had a duty to the passengers and the aircraft was a *factual* issue for them to decide (JA-VI, 2794, 2795, 2797-98, 2809-10, 2811). The District Court should have instructed the jury that the air traffic controllers had a concurrent responsibility with the pilots for the safety of the flight, and that this duty could be breached by a failure to exercise a common law duty of due care or by a failure to comply with specific Government manuals and orders. Indeed, the District Court finally recognized this as a correct statement of the law in its final judgment (JA-I, 504-12).

The District Court also refused to instruct the jury as to the nature of the contribution suit, on the basis that the jury was only considering the issue of liability (JA-VI, 2803, Supp. Inst. No. 38). Clearly the refusal to so instruct the jury was prejudicial error particularly in view of the witness testimony and charges by opposing counsel that the contribution suit was a "cop-out" and an attempt to avoid responsibility. Under such circumstances, the District Court was obligated to instruct the jury that petitioners were pursuing a legitimate claim recognized under North Carolina law. *See* 9 Wright & Miller, Federal Practice and Procedure, §2255, at 654 (1971) ("It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth"). *Accord, Price* v. *Glosson Motor Lines,* 509 F.2d 1033 (4th Cir. 1975); *United States* v. *Holley,* 502 F.2d 273 (4th Cir. 1974).

Furthermore, during the trial it had been the position of the petitioners that the negligence of the respondents occurred when EA 212 descended below 1,800 feet MSL about two miles before the Ross Intersection and the controllers failed to notice and warn of this deviation from the prescribed flight path (JA-II, 662; JA-VI, 2669-70). In its charge to the jury, however, the District Court presented petitioners' contentions in terms of whether or not the controllers should have noticed the low approach of EA 212 and used the ARTS III to guide the airplane down to the runway for a safe landing (JA-VI, 2795-99). At the post-instruction conference, petitioners' counsel pointed out this error and restated petitioners' position (JA-VI, 2806). Upon return to the courtroom, the District Court attempted to restate petitioners' contentions, but again did it in a vague and improper fashion (JA-VI, 2809-10), and then sent the jury out to deliberate without giving counsel another opportunity to object (JA-VI, 2812).[2]

Finally, the District Court failed to instruct the jury properly with respect to the individual respondents' common law and regulatory duty to observe Eastern 212 and advise the pilots of EA 212's low altitude. The District Court charged:

> "Well, you heard a lot of evidence on that subject, and I'm stating it very grossly and perhaps inaccurately. It's up to you to remember all the evidence and to make findings on the subject, and if the controllers assumed the duty and had imposed upon them a duty to give warning to pilots that were seen to be flying too low; and if you find, as Eastern and Aetna contend, that they did see and did fail to use reasonable efforts to warn the pilot and that such reasonable efforts would have got a message to the pilot and the pilot would have pulled up and the accident would have been prevented, if you find all of those facts in favor

[2]The failure to properly present petitioners' theory of the case to the jury was reversible error. *See McCullough* v. *Beech Aircraft Corp.*, 587 F.2d 754 (5th Cir. 1979); *Swietlowich* v. *County of Bucks*, 610 F.2d 1157, 1163 (3d Cir. 1979); *Brandes* v. *Burbank*, 613 F.2d 658 (7th Cir. 1980).

> of Eastern and Aetna and that such action or inaction by the controllers was one of the proximate causes of the accident, then you would find that the controllers had a joint responsibility with Eastern for the safe operation of the plane." (JA-VI, 2796-97).

This charge was completely erroneous. It was not a question of the controllers assuming the duty and having a duty imposed on them to give warnings. The manuals and the common law imposed a duty to give a warning if the controller saw any danger. Further, it was not a question of the jury finding a "joint responsibility"—the jury should have been instructed that if they found as the Court instructed, the respondents were negligent and liable to the petitioners. The charge with respect to the regulatory duty was equally erroneous (JA-VI, 2797-99).

In addition, the Court further instructed the jury that the petitioners had to prove that the controllers had a duty "to keep a constant watch on the radar display and to take constant note on the altitude of the plane. . . ." (JA-VI, 2810-11). However, petitioners had never claimed that the individual respondents had to constantly watch the altitude readout on the radarscope—only that they had to keep a reasonable watch under the circumstances (Petitioners' Proposed Jury Instructions Nos. 26 and 31, R. 119). The District Court's instruction on this issue had the effect of abrogating the legal theory of negligence and placing a burden on the petitioners to prove something beyond what a reasonably prudent controller would do under the circumstances. In summary, both the outrageous misconduct by opposing counsel and the clearly erroneous charge to the jury on petitioners' claims, combined to deny petitioners a fair, impartial and proper jury trial.

2. Respondents offer an abbreviated and biased statement of the facts, and summarily conclude that if there was any negligence by the individual respondents, then that negligence was at most a remote rather than a proximate cause (Resp. 6). However, as discussed in detail in the petition (Pet. 13-16), the negligence of the individual respondents was blatant and the only

explanation for the jury's exoneration of the individual respondents was the prejudicial comments by opposing counsel and the failure of Judge McMillan to properly charge the jury and explain to the jury that a claim for contribution was not a "cop-out" or a "lack of accountability" or a "monster on the loose".

For the Solicitor General to argue that this Court should not consider the petition because two courts have looked at the facts of this case and concluded that there was no negligence on the part of respondents, is to ignore the realities of the situation. Although the Court of Appeals devoted 64 pages to deciding the consolidated appeals (A1-A48), not one sentence is devoted to a substantive discussion of the specific arguments raised for or against petitioners' main point on appeal that the District Court's findings that the Government was not negligent were clearly erroneous, not supported by the evidence, and contrary to law. Therefore, it is quite obvious that the Court of Appeals avoided the factual issues by erroneously concluding that as a matter of law a judgment against the Government bars a judgment against its employees (A48).

3. On page 9 of their brief, respondents conclude that there is "no substantial likelihood that the alleged misconduct of counsel actually prejudiced petitioners, and there is accordingly no need for further review of petitioners' contentions." (Footnote omitted). Respondents reach this conclusion on the basis that petitioners' claim against the Government was tried by Judge McMillan, who allegedly was capable of rejecting any prejudicial statement by trial counsel, and that under 28 U.S.C. §2676 Judge McMillan's decision in favor of the Government allegedly bars petitioners' claim against the individual air traffic controllers. Petitioners respectfully submit that respondents' conclusion is erroneous and that the reasoning underlying respondents' conclusion is faulty.

Specifically, it is absolutely immaterial that Judge McMillan ultimately decided petitioners' claim against the Government in favor of the Government, since Judge McMillan had the opportunity to pass on that claim on the merits *only* because the jury

found in favor of the individual controllers on petitioners' claim against the individual controllers. As discussed in detail on pages 16-17 of the petition, if the jury had found in favor of petitioners against the individual controllers, then petitioners would have moved for a directed verdict against the Government on the basis of *respondeat superior*. Since the pleadings established that at all times the controllers were acting within the course and scope of their employment, petitioners would submit that the District Court would have been required to grant them a directed verdict against the Government. *See Thomas* v. *Poole*, 45 N.C.App. 260, 262 S.E.2d 854, 856, *petition denied*, 300 N.C. 202, 269 S.E.2d 628 (1980). *See also Jackson* v. *Mauncy*, 260 N.C. 388, 132 S.E.2d 899 (1963); *Kiser* v. *Neumann Co. Contractors*, 426 S.W.2d 935, 938 (Ky. 1967); *Restatement (Second) of Agency* §219(1). This potential vicarious liability of the Government, which would become vested upon a jury verdict against the individual controllers, was very clearly recognized in the Fourth Circuit's initial decision in this litigation:

> "As heretofore noted, the plaintiffs allege, and the Government admits, that the controllers were acting within the course and scope of their employment at the time of the crash, and under such circumstances *any finding of negligence against them would be imputable to the Government and place liability upon it under the Tort Claims Act.*"

Aetna Cas. & Sur. Co. v. *United States*, 570 F.2d 1197, 1201 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978) (emphasis added).

Since the jury's finding on the claim against the individual controllers *preceded* Judge McMillan's determination of the claims against the Government, and since petitioners would have been entitled to a directed verdict on their claim against the Government if the jury found in petitioners' favor on their claim against the individual controllers, any prejudicial effect on the jury of improper remarks by trial counsel obviously would prejudice the petitioners. By virtue of the Seventh Amendment, petitioners were entitled to a trial by jury on their

claims against the individual controllers, and the fact that Judge McMillan found in favor of the Government cannot be accepted as excusing any improper remarks by trial counsel that affected the jury.

In a half-hearted attempt to refute this, respondents argue in footnote 11 of their brief that "Even if the jury had found against the individual respondents, the judgment of the district court for the United States under the FTCA would have constituted a bar to the claims against the FAA employees." It is simply incredible that respondents would argue such a position in this Court, particularly since respondents' own cited case law supports the principle that the Government is liable for the acts of its employees, not respondents' illogical theory that Government employees are relieved from adjudicated liability if the Government itself is adjudicated not liable. The discussion of 28 U.S.C. §2676 in respondents' cited cases —*Satterwhite* v. *Bocelato*, 130 F.Supp. 825, 829 (E.D.N.C. 1955); *Lauterbach* v. *United States*, 95 F.Supp. 479, 482 (W.D. Wash. 1951); *United States* v. *Gilman*, 347 U.S. 507, 509 (1954)—is in terms of a judgment in favor of a claimant *against* the Government as constituting a bar to a claim against the employee, and offers no support for respondents' contention that if an employee is adjudicated liable then a subsequent adjudication in *favor* of the Government would bar enforcement of the earlier judgment against the employee. Respondents cite no cases directly supporting their theory, and petitioners have found none. It is clear that notwithstanding the respondents' contention to the contrary, Judge McMillan's decision in favor of the Government would not bar petitioners' claim against the individual respondents under 28 U.S.C. §2676. Indeed, as discussed above, if the jury had found in favor of petitioners against the individual controllers, the petitioners would have been entitled to a directed verdict against the Government on the basis of *respondeat superior*.

Finally, as a related matter, respondents bury in footnote 5 on page 5, without discussion, the argument that, while petitioners challenge Judge McMillan's failure to submit the case

against the Government to the jury after having initially determined that the jury would render an advisory verdict against the Government, petitioners do not explain the prejudice to petitioners. However, the prejudice was clear and arose in several different ways:

(1) Before even hearing any evidence on the Government's liability, the trial judge expressed the opinion that the Government "got little or no liability" (JA-II, 732). This statement was made during a discussion following the Government's announcement that it had settled the two Eastern Air Lines stewardess cases for $100,000 (JA-II, 726-34). Ordinarily, the petitioners at this point would have asked the trial judge to recuse himself since he had formed an opinion on the merits before hearing the evidence (*United States* v. *Pfizer, Inc.*, 560 F.2d 319, 322 (8th Cir. 1977)); however, since there was to be an advisory jury determination on the Government's liability, counsel decided to forego such a motion;

(2) The jury from the very beginning had been told that it would decide the liability of the United States, yet, when the time came for the jury to deliberate, they were given no instructions with respect to the liability of the Government and were asked to return no verdict with respect to the United States. Under these circumstances, the jury must have believed that the case against the Government lacked merit and had been dismissed by the trial judge. The failure to clarify the situation was obviously prejudicial to petitioners;

(3) Since the District Court announced that it would have an advisory jury, petitioners' counsel structured his case for presentation to the jury. For the District Court to wait until after respondents rested to announce that the jury would not render an advisory verdict was grossly unfair; and

(4) Although prior to closing argument the District Court advised petitioners' counsel that it would instruct on *respondeat superior*, the District Court subsequently refused to do so. It could well have made a difference to the jury to know that the Government would be responsible if the controllers were held

liable. Indeed, the fact that the Government would be responsible for the acts of the controllers was one of the reasons that the Court of Appeals gave for holding that the United States Attorney could represent all the respondents. *See Aetna Casualty & Surety Co.* v. *United States*, 570 F.2d 1197 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978).

Prejudice resulting from a change in trial format has been expressly recognized by the Court of Appeals for the Ninth Circuit in *Pradier* v. *Elespuru*, 641 F.2d 808, 811 (1981):

> "The entire trial took place with the understanding that the jury's verdict would be advisory only. There are frequently significant tactical differences in presenting a case to a court, as opposed to a jury. The parties are entitled to know at the outset of the trial whether the decision will be made by the judge or the jury." 641 F.2d at 811.

It is, therefore, clear that the prejudicial statements of opposing counsel combined with the failure of the District Court to properly charge the jury on petitioners' claims and to control the conduct of the trial and its format, resulted in such prejudice to petitioners that they were denied a fair and impartial trial.

CONCLUSION

The Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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